

U. S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

DELIVERMED HOLDINGS, LLC, an
Illinois Limited Liability Company,
MARK SWIFT, LINDA DEETER, and
WILLIAM R. DEETER ASSOCIATES, INC.

Plaintiffs,

v.

MICHAEL L. SCHALTENBRAND,
MEDICATE PHARMACY, INC, and,
JOEY D. SIDDLE,

Defendants.

Case 3: 10-cv-684-JPG

CONSOLIDATED WITH:

MARK A. SWIFT,

Plaintiff,

v.

MEDICATE PHARMACY, INC, and
MICHAEL L. SCHALTENBRAND,

Defendants.

Case 3: 10-cv-685-JPG

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

BEFORE THE HONORABLE J. PHIL GILBERT
UNITED STATES DISTRICT JUDGE

April 25, 2012

COURT REPORTER: Christine A. Simpson, CRR, RPR, CSR
UNITED STATES DISTRICT COURT
301 W. Main Street
Benton, IL 62812
(618) 439-7725

Proceedings recorded by mechanical stenography, produced
by computer-aided transcription.

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CRAIG L. GREENE:

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1 (Proceedings began at 8:25 a.m. in open court.)

2 THE COURT: Okay, we are back on the record.

3 Parties are present with their representative counsel. We
4 are still in the direct cross-examination so to speak of
5 Mr. Siddle. Mr. Cox, are you ready to proceed?

6 MR. COX: I am, Your Honor. With the exception
7 that I have just received this morning a copy of that
8 document Mr. Siddle was talking about yesterday and I have
9 just marked it as an exhibit, but I haven't had a chance
10 to make copies of it.

11 MS. SCHRICK: We have a copy.

12 THE COURT: Do you want Tracy to make a copy real
13 quick?

14 MR. COX: That way, I'd like for you to have it as
15 well.

16 (Off the record.)

17 THE COURT: Okay. Copies have been made and we're
18 ready to roll.

19 DIRECT EXAMINATION (continued)

20 BY MR. COX:

21 Q. Mr. Siddle, yesterday you told us that you had
22 received a document, you said a handwritten document from
23 Schaltenbrand and Schaltenbrand regarding some numbers
24 that you then plugged into your tax return. Do you recall
25 that?

1 A. I said that, yes, sir.

2 Q. And you said you didn't recall who it came from
3 but you were sure it was from Schaltenbrand and
4 Schaltenbrand; is that right?

5 A. Yes.

6 THE COURT: You have to answer yes or no.

7 THE WITNESS: Yes, sir. I said yes, sir.

8 Q. (BY MR. COX) Be sure to answer out loud because
9 the reporter is going to write down what you say. Okay?

10 A. (Nonverbal response.)

11 Q. Now then, this morning we have been provided by
12 your attorneys with a document which we have marked
13 Exhibit 97, and which we have given you a copy of. Do you
14 have it in front of you?

15 A. Yes, sir, I do.

16 Q. Is this the document that was sent to you by
17 Schaltenbrand and Schaltenbrand?

18 A. Yes, they faxed this to me on April the 12th,
19 2006.

20 Q. Did you ask for it or was it just sent to you?

21 A. I just asked for all my documents that I needed
22 from working for Medicate Central Pharmacy.

23 Q. Who did you ask?

24 A. I do not remember, sir.

25 Q. And do you know who faxed this to you?

1 A. I do not know.

2 Q. I see in the upper right-hand corner it says page
3 two of three. Do you know where page one is?

4 A. I do not know. It was -- I checked my files,
5 there was nothing, I noticed that too, it must have been a
6 cover sheet or something.

7 Q. Can you recall what was on the cover sheet?

8 A. No, sir, I do not.

9 Q. When you got this, did you review it?

10 A. At the time?

11 Q. Yes.

12 A. No.

13 Q. Well, when it came in, the fax, did you look at it
14 and see what was on it?

15 A. Yeah, I looked at the name and everything and I
16 just put it with my other papers. I didn't like go
17 through it, you know, until I plugged it into the
18 computer.

19 Q. Okay. So then when you plugged it into the
20 computer, you took these exact numbers and put them into
21 the return that you filed?

22 A. Yes, sir.

23 Q. And did you take any steps to determine what,
24 whether what you were putting in your return, the numbers,
25 were accurate or not?

1 A. I just, I just took it for granted that Medicate
2 Pharmacy -- I mean Schaltenbrands knew the numbers were
3 correct. I just took them as an accountant.

4 Q. Now then, can you tell me what you understood
5 these numbers to mean? For example, the \$128,057 of gross
6 receipts, part one, line one, what did you understand that
7 to be?

8 A. At the time I took that as being probably 10
9 percent of the, the revenue that came in for the mail
10 order side.

11 Q. And would you say it was probably the 10 percent
12 of the net profit?

13 A. No, sir.

14 Q. Okay. So this would be the 10 percent of the
15 sales?

16 A. Yes, sir.

17 Q. So what you were putting down was the, all of the
18 sales of the business?

19 A. That's what I took that as when I, when I, when I
20 put it into the tax.

21 Q. Now you told us yesterday that you weren't
22 supposed to get 10 percent until the business sold, but
23 this looks like you're getting your 10 percent as you go.
24 Is that a fair statement?

25 A. That's a fair statement, yes.

1 Q. Okay. And then we see a subtraction here for cost
2 of goods sold and then the gross profit would be, what?
3 What would that represent?

4 A. Gross profit is what you have after you take out
5 of the cost of goods it's called, I think that's called a
6 profit margin but I'm not sure.

7 Q. So then we go on and we start deducting some
8 expenses from that gross income; is that correct?

9 A. Yes, sir.

10 Q. And do you know whether these numbers are accurate
11 or not in terms of expenses?

12 A. Sir, I didn't figure these numbers, they gave them
13 to me.

14 Q. Okay. So you just relied on what they gave you?

15 A. The accountants, yes, I think it's 10 percent of
16 whatever the real number was, that's what I'm thinking.

17 Q. Okay. In other words, you take this DeliverMed
18 mail order business and 10 percent of the gross sales for
19 2005 would have been 128, so that's about, what, 1.2
20 million?

21 A. No.

22 Q. And then you subtract the cost of goods, which
23 would be about 900,000 total? Is that right?

24 A. That's what I'm thinking. I'm guessing.

25 Q. So the gross profit for the business for 2005 the

1 DeliverMed mail order was about \$378,000? According to
2 this?

3 A. Yeah, and then you start taking overall the
4 expenses over that, yeah.

5 Q. Okay. Then we see what expenses are being
6 deducted. Let's take a look at those. The first expense
7 that's deducted is advertising. So, it looks like about
8 \$5,600 of advertising would be the total; correct?

9 A. That's what I'm thinking, yes, sir.

10 Q. And then we have interest that's being paid of
11 about 4,900. I'm using the 100 percent figures, you
12 understand?

13 A. Yes, sir.

14 Q. And then legal and professional services, about
15 \$580. And then a pension and profit sharing, looks like
16 about maybe \$660, that cost total. Did you have a pension
17 or profit sharing plan in this business?

18 A. No, not in DeliverMed, no, uh-uh.

19 Q. So when you looked at it and read it did you
20 wonder what's that for or we don't have one of those?

21 A. Sir, Schaltenbrand said go ahead and file this,
22 Joe. I said okay.

23 Q. My question is: Did you wonder since you don't
24 have a pension or profit sharing plan why there's a number
25 there?

1 A. No. I was not looking at -- no, sir, I did not.

2 Q. Okay. And again supplies looks like \$5,210; taxes
3 and licenses about \$9,000; wages about, looks like about
4 \$95,000 of wages in this business. Who were the employees
5 of the business at that time?

6 A. At that time I don't totally recall exactly who.

7 Q. You don't recall having any employees at that
8 time?

9 A. That's not what I said.

10 Q. I'm sorry.

11 A. I said I don't recall who they were at that time.

12 Q. Don't recall. Who -- do you know how many there
13 were?

14 A. At that time, I want to guess, I would think that
15 was probably just doing, you know, we're within a pharmacy
16 and there was staff that just did the mail order side.
17 And I'm in my head counting right now. I would think
18 probably about, I want to say maybe six?

19 Q. Okay. And those six made about \$95,000 then?

20 A. Sir, I'm guessing. I don't know.

21 Q. Well, let's go to the line that says other
22 expenses. To find out what those are, we have to turn to
23 page two at the bottom. And it looks like we have here
24 bank service charge, I would take that to mean, of about
25 \$180, and delivery. What's that?

1 A. \$660 delivery. I do not know.

2 Q. Because the mail order business which we're
3 talking about here didn't make deliveries, did it?

4 They --

5 A. No, sir.

6 Q. -- shipped things. So then we have miscellaneous
7 of, it looks like about \$18,000. Do you know what that's
8 for?

9 A. No, sir.

10 Q. And then telemarketing, that was to pay DeliverMed
11 Holdings for marketing?

12 A. Yes, sir.

13 Q. And that was, looks like it's close to \$400,000.

14 A. Yes, sir.

15 Q. And what we don't see is an expense or deduction
16 here is the \$7 per prescription, do we?

17 A. No, sir, wouldn't be there.

18 Q. All right. Because that's not a deduction from
19 net profit, is it?

20 A. Sir, the \$7 had to do within the pharmacy. I
21 explained that yesterday. It had nothing to do -- the \$7
22 has to be taken before your net profit when you're dealing
23 with three guys out with a mail order service within a
24 pharmacy.

25 Q. That's my point. When you talk about the \$7, it's

1 already out before you even get to the net profit numbers;
2 correct?

3 A. No, we probably have to add up all these numbers
4 here below the 37,000 to figure out if that comes out to
5 \$7, if I had the number of how many prescriptions were
6 sent out the same time.

7 Q. I'm sorry, I didn't follow that.

8 A. Your \$7, sir, we're guessing that that's the
9 number that we're deducting off the \$37,000 here that that
10 has the profit margin in it.

11 Q. Well, show me where in the expenses here you are
12 deducting off the \$37,000 the \$7. Where is it?

13 A. You just asked me, the \$7 is not in there.

14 Q. Right.

15 A. Okay? \$7 is overhead that, we're thinking it's \$7
16 a prescription. That has to calculate how much that
17 department within the pharmacy is. Okay?

18 Q. So you're not deducting it off the gross profit in
19 this?

20 A. If I knew how many prescriptions that this
21 represented and totalled up all the overhead, divided by
22 that, that would give me a real clear to see if our \$7 is
23 correct.

24 Q. Well, we see advertising, we see legal services,
25 we see interest, we see all the things we have looked at

1 but we don't see that overhead here being deducted, do we?

2 A. Well, no, it's broken out a different way.

3 Q. Where? Where is it -- point to where it is in
4 here where that's being deducted.

5 A. There's no \$7 on there because I don't have a
6 total of how many RXs that that \$128,000 represents. Then
7 I could turn around and figure if my \$7 is correct. The
8 \$7 is a guess of this whole operation cost because you
9 have all these different numbers to see if that's what it
10 is, we had to average out what that was. It wouldn't be
11 on this document.

12 Q. Okay. It's not here, is it?

13 A. No, it's broken out a different way.

14 Q. Well, where is it broken out? That's what I'm
15 asking you. Where would I look to find the \$7 in these
16 various expenses. That's all I'm asking.

17 A. If I had how many RXs that this represented, then
18 I could divide what the cost of the overhead was against
19 that, and that could tell me what, what that is, if it's
20 \$7 or \$8 or \$6. That was numbers we were just trying to
21 figure out what the overhead would cost.

22 Q. Well --

23 A. This actually breaks it out a different way.

24 Q. Well can you tell me -- let's go through them.

25 I'm sorry, we'll have to go through them now. Under

1 advertising, would the \$7 be included in the advertising
2 expense?

3 A. It would be in that -- it would not be in the
4 \$39,000 though in the telemarketing page two because we
5 never -- the \$7 had to do with the overhead of the cost,
6 what it cost that mail order business being inside a
7 pharmacy. It cost a pharmacist, it cost a staff, it cost
8 advertising, the cost of the mortgage cost, the cost of
9 the legal -- everything --

10 Q. Mr. Siddle?

11 A. -- power, utilities.

12 Q. Mr. Siddle? Just a moment.

13 A. I'm just trying -- I'm just trying to get you to
14 understand.

15 Q. I understand. So you're saying that the \$7 would
16 not be included in the marketing expense?

17 A. That's correct.

18 Q. Okay. Is, is -- it wouldn't be included in the
19 advertising expense, would it?

20 A. If that's something that the pharmacy has to pay
21 for, it is. We're just trying to figure out what that,
22 that piece of business within a pharmacy would cost.

23 Q. And would it be included in the interest, the
24 \$4,900 interest, is the \$7 included there?

25 A. If that's some sort of expense a pharmacy has,

1 then it would because I have to figure out what that piece
2 would cost within a pharmacy.

3 Q. All right. How about the legal services?

4 A. Sure, if that's an expense a pharmacy has, then I
5 have to make sure that within a pharmacy I have to pay my
6 portion of what that whole cost of operating expense is in
7 a pharmacy.

8 Q. Let me ask this, that isn't it true that what we
9 are talking about here are expenses just for the mail
10 order; right?

11 A. They just kind of sliced out what they think the
12 mail order would be.

13 Q. Okay. So, in other words, the mail order part of
14 the business spent \$580 on legal services; correct?

15 A. No, what they said was the pharmacy in a whole --
16 you know, I'm not real sure. I'm not sure what they're
17 saying.

18 Q. Okay. You just put them in the return?

19 A. I just had No. 8. And I took No. 8 and put it in
20 No. 8. I took No. 19, put it in No. 19.

21 Q. Isn't it true that the \$7 is just a calculation
22 for management to keep track of, of things, not for
23 financial reporting, isn't that true?

24 A. Yes, sir.

25 Q. Okay. Now, you said Schaltenbrands told you,

1 Schal tenbrand said, go ahead and file this, Joe. Which
2 Schal tenbrand, Larry Seni or or Larry Juni or, told you to
3 go ahead and file this information with the --

4 A. I don't remember.

5 Q. One of the two, though; right?

6 A. Somebody from there, I don't remember. They
7 talked to me or a secretary sent it to me. I'm sure all I
8 did was requested my documents and they faxed them to me.

9 Q. You said Schal tenbrand said to go ahead and file
10 this, Joe. And I'm just asking, it had to be ei ther Larry
11 Juni or or Larry Seni or because they're the only
12 Schal tenbrands there.

13 A. I meant Schal tenbrand and Schal tenbrand the
14 company.

15 Q. So you relied on them and you did what they told
16 you and you filed this information.

17 A. Yes, sir.

18 Q. Very good. Let's take a look at Exhi bi t 8,
19 Pl ai nti ff' s Exhi bi t 8, and if you would turn please to
20 page 34. So what was the sales, total sales for the
21 period ending December 31, 2005?

22 A. 1 million 755,302.

23 Q. And what would 10 percent of that be?

24 A. It would be 1,755,000.

25 Q. No, 10 percent of that.

1 A. Well, it would be 175,000 and some change.

2 Q. Right. Now go back to Exhibit 97. How much did
3 the Schaltenbrands tell you was your 10 percent of the
4 sales?

5 A. 128,000.

6 Q. So that's not correct, is it?

7 A. No, sir, it's not.

8 Q. Yeah. They shorted you a little bit, didn't they?

9 A. I, I guess I should have had a bigger -- I don't
10 know, I guess, yeah.

11 Q. I mean, you know that 175,000 is more than
12 128,000.

13 A. Yeah.

14 Q. By about 50,000, roughly. So you were shorted,
15 weren't you?

16 A. It was a wrong number, yeah, or they're two
17 different numbers.

18 Q. Yeah, and the one they told you is less than the
19 one we see over here; right?

20 A. You'll have to ask them. I don't know.

21 Q. Right. Okay. Well then the cost of goods, how
22 much was that?

23 A. \$1,204,793.

24 Q. It looks like the number over here is 90,000. It
25 looks like they kind of give you a break on that number

1 but it's definitely different, about 900 instead of --

2 A. Yeah, that's correct.

3 Q. -- these numbers, what they're showing you on this
4 paper, 97, aren't matching up, are they, to what's
5 actually on the financial statements, are they?

6 A. No, sir, they're not.

7 Q. Gross profit. They showed about 370,000 gross
8 profit. But when we look over here, we see actually the
9 gross profit should have been about, for you, about
10 \$55,000.

11 A. Sure, if they would have showed the 1.75 over
12 here, too, yeah, absolutely.

13 Q. Right. Right. So these numbers that they have
14 given you aren't, aren't accurate, are they?

15 A. Not according to these two documents.

16 MS. SCHRICK: We object to foundation. There's
17 been no foundation that witness prepared or submitted the
18 financial statements and can comment on their accuracy.

19 THE COURT: Overruled.

20 Q. (BY MR. COX) Well let's take a look at some of
21 these expenses while we're here. First of all, do you see
22 an expense for a pension and profit sharing plan over here
23 on page 34 of Exhibit 8?

24 A. No, sir, I do not.

25 Q. So, can you explain why it's showing up here on

1 Exhibit 97?

2 A. I do not have a clue. I'm sorry.

3 Q. Well, let's see about legal services. Do you see
4 any legal services over here on page 34?

5 A. No, sir, I do not.

6 Q. Bank charges.

7 A. No, sir, I do not.

8 Q. Actually, there are bank charges on page 34.

9 A. Oh, I'm -- I --

10 Q. All right. I didn't want you to miss --

11 A. Sorry about that.

12 Q. That's all right. And so those bank charges, it
13 looks like 10 percent would be about \$18, so that figure
14 looks right. But we don't see the \$7 on either one of
15 these, page 34 of 97, do we?

16 A. No, not without the RX number.

17 Q. Okay. Now then, let me take a look, I just got
18 this document, if you can just bear with me for just one
19 moment. I wanted to ask you about, it says delivery
20 expense over here. Actually, that number looks right.

21 A. I'm sorry, which page are we talking about?

22 Q. On page 34.

23 A. Okay.

24 Q. It says delivery expense, \$657. And that's
25 showing up as \$66. That looks right on the, this sheet

1 they gave you. But you don't recall any delivery that had
2 to be made for the mail order business?

3 A. No, sir. On page 34, if you look like where it
4 says cost of goods and right underneath there, freight and
5 all that? That's shipping costs? That's where your
6 shipping cost is, it's considered a different name.

7 Q. So you think that's the cost of shipping all the
8 stuff?

9 A. Yes, sir.

10 Q. All right. One of the things I wanted to ask you
11 about is, you were given this and when you look at it,
12 this appears to make you sole proprietor. Do you know
13 what a sole proprietor is?

14 A. Yes, sir.

15 Q. What is a sole proprietor?

16 A. That I own this DeleverMed. It's not DeliverMed,
17 it's been spelled wrong, but that I own this company.

18 Q. Right. But you didn't own the company, you own 10
19 percent of the company; right?

20 A. No, I just, I just fill out -- I just filled this
21 out. Because if you look at this, they fill it out this
22 way, so they even put my address in there and they
23 misspelled DeliverMed. I just, I thought that was
24 supposed to be right. They even put my Social Security
25 number in there. I just moved it over to my tax return.

1 Q. Well, they were showing what -- what they're
2 showing here is that you owned a business --

3 A. Yeah.

4 Q. -- by yourself using your Social Security number,
5 your address, with the name DeleverMed. And that this is
6 your income and expenses and so on; right?

7 A. At that time I thought I was supposed to do it
8 this way. I thought that I guess Mark got one and Mike
9 got one. I didn't ask, I just filled it in.

10 Q. As you look at it now, does it appear that they
11 were wrong in what they sent you?

12 A. At the time I thought that was supposed to be what
13 was supposed to be done. Obviously they didn't do this
14 again on 2006, so apparently they stopped doing it,
15 whatever it was.

16 Q. My question is: As you sit here today do you
17 realize this is wrong? You weren't a sole proprietor --

18 A. I -- yes, sir.

19 Q. And these aren't the right numbers?

20 A. I don't -- the numbers don't add up.

21 Q. Right. Right. Now was Schaltenbrand and
22 Schaltenbrand the accounting firm you used?

23 A. No, sir.

24 Q. So do you know why they sent this to you? Did you
25 ask for it or what happened exactly?

1 A. They give me my W-2 and they give me a 1099 at the
2 time for Medicate Respiratory Pharmacy, gave me the K-1
3 and they gave me this, too. They said, here's all your
4 stuff, file it, so I did it.

5 Q. A K-1 is for a partnership?

6 A. Yes, sir.

7 Q. And at this time in 2005 DeliverMed, what you were
8 calling DeliverMed was a partnership between you and Mark
9 and Mike, so they should have given you a K-1 instead of
10 this; right?

11 A. There was never a business, as far as I know. I
12 never got any shares of any company.

13 Q. No I'm not saying --

14 A. Medicate Respiratory, they gave me shares, okay?

15 Q. You told us yesterday you were in a partnership
16 with Mike and Mark in this mail order business so you
17 should have gotten a K-1, not this; correct?

18 A. If it was a business. It wasn't -- when I say the
19 word partner, Mike and Mark and I came together and Mark
20 had an idea. He had a DeliverMed, Mike had a pharmacy,
21 and I had the knowledge of putting together this thing.
22 And together we used the pharmacy to have this partnership
23 of having these patients.

24 Q. Sure.

25 A. I'm not talking, there was no corporate shares

1 given out and the big corporation. It wasn't like that.

2 It was just a partnership between three guys.

3 Q. Sure. And if you have a partnership, your
4 partnership income, which is you're talking about here
5 would show on a K-1; correct? That's what a
6 partnership --

7 MS. SCHRICK: Objection, Your Honor, calls for
8 legal and accounting conclusion.

9 THE COURT: Sustained.

10 MR. COX: Very good. Thank you, sir.

11 THE COURT: Why don't we take a break now and
12 we're going to, I think at 9:00 have some video. Who's
13 going to be at 9:00?

14 You may step down.

15 THE WITNESS: Oh, thank you.

16 MR. MCGURK: Your Honor, it will be Mr. Allan
17 Kovi n, K-O-V-I -N.

18 THE COURT: Mr. Siddle, other than your attorneys
19 you are still on the stand because --

20 MS. SCHRICK: We'll have a few questions.

21 THE COURT: You'll have a few questions. So
22 again, don't talk to anybody other than your attorneys.
23 Okay?

24 THE WITNESS: Yes, sir.

25 (Court recessed from 8:54 a.m. to 8:56 a.m.)

1 (Witness sworn by clerk.)

2 THE WITNESS: It's Allan Kovi n, last name is
3 spelled K-O-V-I - N.

4 THE COURT: Is Allan -- spell Allan. There's two
5 different ways to spell Allan.

6 THE WITNESS: I'm sorry. A-L-L-A-N.

7 ALLAN KOVIN,
8 having been first duly sworn, was examined and testifies
9 as follows:

10 DIRECT EXAMINATION

11 BY MR. McGURK:

12 Q. Mr. Kovi n, where do you reside?

13 A. I reside, do you want my home address or town?

14 Q. Home address is fine.

15 A. Okay. I reside 5208 Lilac Court, Lansdale
16 Pennsylvania 19446, and that's in Montgomery County.

17 Q. Is that also your, the location of your studio?

18 A. Yes.

19 Q. What is your business? What is the business name
20 you function under?

21 A. Kovi n Design.

22 Q. Spelled the same way?

23 A. Yes, my last name and Design, which is what I do.
24 I'm a designer, graphic designer.

25 Q. Can you describe your educational experience

1 starting with high school?

2 A. I graduated Northeast Philadelphia High School,
3 art curriculum. Went on to post-grad at Dobbins Tech in
4 Philadelphia where I also received a two-year degree in
5 commercial art. And attended evening school at
6 Philadelphia College of Art for a few semesters.

7 Q. Did you also serve in the military?

8 A. Yes, I did. I was in the National Guard.

9 Q. Can you describe --

10 A. Honorable discharge.

11 Q. I'm sorry.

12 A. Served in the National Guard, served my full term
13 and was granted an honorable discharge after my term of
14 duty.

15 Q. Mr. Kovin, as you know we are on a video
16 connection so I will try and speak slowly and I want to
17 make sure I don't talk over you. And if I am going too
18 fast I want people to slow me down.

19 Can you describe your work experience after you
20 completed your studies at the Philadelphia College of Art?

21 THE COURT: I'm going to interrupt here. Is there
22 any dispute, we don't have a jury here, that Mr. Kovin is
23 a graphic designer that has a lot of experience and so we
24 can just jump right into the issues in this case?

25 MR. SCHUVER: We'll stipulate to that, Judge.

1 THE COURT: So stipulated.

2 MR. McGURK: Very well.

3 Q. (BY MR. McGURK) Mr. Kovi n, do you have experience
4 in the pharmaceutical area --

5 A. Yes.

6 Q. -- in terms of design work?

7 A. About 20 years.

8 Q. Approximately 20 years of work in the
9 pharmaceutical area?

10 A. Yes.

11 Q. Do you know Linda Deeter?

12 A. Yes.

13 Q. And what is the name of her firm?

14 A. Deeter Marketing and Advertising.

15 Q. And is that where you are located physically right
16 at the moment?

17 A. Yes.

18 Q. And what town is that located? In what town is
19 that located?

20 A. Doylestown, Pennsylvania.

21 Q. That's in Bucks County, Pennsylvania?

22 A. Yes, Bucks County, yes.

23 Q. And have you worked for Linda Deeter for a period
24 of time on various projects?

25 A. Yes, I have worked with her on other projects.

1 Q. Directing your attention to 2008, did you and
2 Linda Deeter work together on a project involving a
3 company called DeliverMed?

4 A. Yes.

5 Q. Can you describe how that started?

6 A. I received a call from Linda about a new project,
7 and I met with her at her offices where we are now and she
8 gave me a briefing of the project, and it happened to be
9 the DeliverMed logo design, and that was our initial
10 meeting.

11 Q. Mr. Kovin, I want to make sure you keep your voice
12 up so we all can hear. Do you recall where the meeting
13 took place?

14 A. Yes. The meeting took place in Deeter's offices.

15 Q. In Doylestown?

16 A. In Doylestown, correct.

17 Q. What did you do next?

18 A. Well, after given the assignment I, since I'm a
19 contractor, freelance artist, I took it back to my studio,
20 worked on it, developed creatives to present to Linda. In
21 this particular case Linda was playing, planning to have
22 the role of art director and has me as graphic designer.
23 And normally in the chain of command I report back to her,
24 and that's exactly what I did with my creatives. We met
25 again at her offices again in Doylestown and reviewed what

1 I had came up with for the new DeliverMed logo.

2 Q. What do you mean when you use the term art
3 director? What do you mean in the industry?

4 A. Well, okay, usually there's a chain of command and
5 the, in a creative environment, a creative department
6 usually the person in charge is the art -- is titled the
7 art director. There's senior art directors and junior art
8 directors. And underneath the art director usually you'll
9 have the graphic designer, also senior graphic designer
10 and junior graphic designer. So Linda was in this
11 particular case and going forward, you know, this is the
12 way we usually work on all projects, Linda assumes the
13 role of the art director and I assume the role of the
14 graphic designer. So I answer to Linda. You know, Linda
15 gives me input and I, you know, do what I, you know,
16 whatever the project is and report back to her. And then
17 we review everything and, you know, it's a, it's a
18 cooperative with, you know, we cooperate together,
19 coordinate things.

20 Q. Did you -- I'm sorry. Have you completed your
21 answer?

22 A. Yeah. We both interact giving input to each other
23 as far as whatever the project may be.

24 Q. Did you come -- did you prepare a number of
25 different proposed idea -- design ideas for review by

1 Linda Deeter on the DeliverMed project?

2 A. Yes, there were, you know, several designs for the
3 logo that were presented.

4 Q. Who -- so how did the process work once the, the
5 proposed designs were, were presented?

6 A. As I said, I would report back to Linda and
7 present all the different variations of the, what the logo
8 could look like, you know, back to her. I presented those
9 to her when I, when we met again. And we reviewed them,
10 kind of like pasting them up on the board, looking at them
11 side by side and deciding which popped, which didn't, you
12 know, because logos have personalities like people and we
13 were trying to match the look of a particular logo to that
14 particular client. And that's part of the process, you
15 know.

16 Q. Unfortunately, we don't have a way of, of
17 displaying on your screen and on our screen the same
18 document, so I'm going to ask you to pull up or to get a
19 document that is Plaintiff's Exhibit 36.

20 A. Okay.

21 Q. It has in the lower right-hand corner Exhibit 36.

22 A. Yes.

23 Q. And I'm going to put it on the document camera.

24 (Pause.) Is Plaintiff's Exhibit 36 the logo that you and
25 Linda Deeter ultimately decided to present?

1 A. Yes, this was the final selection.

2 THE REPORTER: Could you ask him to repeat that?

3 Q. (BY MR. MCGURK) Could you repeat that?

4 A. This was the final logo that we all agreed on.

5 Q. When you say, we all agreed on, who are you
6 referring to?

7 A. Well, I'm referring to myself, Linda, and her
8 client, I believe Mr. Swift, in which I didn't have any
9 interaction with. I just, you know, Linda would take the
10 logo and present it to the client and, you know, she would
11 come back to me with feedback and we would sort all of
12 that feedback out. So when I say all, that's what I mean,
13 myself, Linda and her client.

14 Q. All right. Now, referring to Plaintiff's Exhibit
15 36, we have up on the monitor, this is just in black and
16 white but in color it, there are two different colors on
17 here; is that correct? Or on the logo in real life, if
18 you will?

19 A. I think there were three colors.

20 Q. Three colors?

21 A. You see black and white, but if I recall there
22 were three colors.

23 Q. Who selected the colors for that final logo?

24 A. Well, again it was an operation between Linda and
25 myself basically.

1 MR. McGURK: Your Honor, I would move the
2 admission of Plaintiff's Exhibit 36.

3 THE COURT: Any objection?

4 MR. SCHUVER: No objection.

5 THE COURT: Be admitted.

6 Q. (BY MR. McGURK) Now after you completed your work
7 with Linda did you submit a bill?

8 A. Yes, I did.

9 Q. And were you paid?

10 A. Yes.

11 Q. Who did you intend the logo to be owned by? That
12 is to say, who did you intend was to have ownership of the
13 logo at the end of the process?

14 A. Linda's client, DeliverMed.

15 Q. Turning to 2012, this year, did there come an
16 occasion when you received a telephone call from a Mr. Ned
17 Randle?

18 A. Yes.

19 Q. Can you describe what occurred?

20 A. I received several phone calls from Mr. Randle.

21 Q. How many?

22 A. It occurred I guess within a two-, possibly
23 three-day period, and each day around two calls or so.

24 Q. So over a two- or three-day period he called twice
25 a day?

1 A. I believe so.

2 THE COURT: Can he pinpoint when this was in 2012?

3 Q. (BY MR. MCGURK) Do you recall whether this was
4 during the month of February of 2012?

5 A. I, you know, I don't know the exact day or month
6 but February, around February would sound about, about
7 right.

8 Q. Was there is a message left as to why Mr. Randle
9 was trying to reach you?

10 A. Yes. It was vague and I don't recall exactly what
11 it was, but I was hesitant to return it for that reason.
12 I don't return unknown phone calls.

13 Q. Ultimately did you talk to Mr. Randle?

14 A. Yes, I did.

15 Q. What did he want?

16 A. What it boiled down to after talking with him for
17 a little bit, he was interested in purchasing the logo,
18 the DeliverMed logo from me.

19 Q. Did he make a monetary offer?

20 A. Yes, he did, on the first conversation, a thousand
21 dollars.

22 Q. That was his first offer, was a thousand dollars?

23 A. Yes.

24 Q. And did he state who he, or whose behalf he was
25 calling?

1 A. He told me that there was a dispute going on and
2 that, you know, I don't know who his client was. I was
3 not familiar. I mean, I, at that particular time I was
4 only familiar with DeliverMed. I was not aware of any
5 other, you know, anyone else being involved. I mean, this
6 was all new to me. It was more or less a shock, a
7 surprise so, no, he, he may have mentioned his client but
8 there's no reason that I would have remembered the name at
9 that time.

10 Q. Well, let me ask this question: Have you ever
11 been an employee of Medicate Pharmacy Inc. of East St.
12 Louis and Washington Park, Illinois?

13 A. No.

14 Q. Have you ever met Mr. Michael L. Schaltenbrand?

15 A. No.

16 Q. Have you ever been an employee of Mr. Michael L.
17 Schaltenbrand?

18 A. No.

19 Q. Have you ever entered into a written contract with
20 Mr. Michael L. Schaltenbrand to design a logo?

21 A. No.

22 Q. Have you ever entered into a contract with
23 Medicate Pharmacy Inc. to design a logo?

24 A. No.

25 Q. All right. So Mr. Randle contacted you, he made

1 this offer. Did he, did he increase the offer at any
2 time?

3 A. Yes.

4 Q. What did he get up to?

5 A. I was told 3,000, that he, you know, wasn't
6 directly to me, the offer. My attorney had been in touch
7 with him.

8 Q. Your --

9 A. He made the offer to my attorney.

10 Q. And for the clarity of the record, I am not your
11 attorney in this matter; is that correct?

12 A. Correct.

13 Q. Why did you not accept his offer?

14 A. I -- to me it seemed very obvious that it wasn't
15 the right thing to do. It seemed unethical.

16 Q. Mr. Kovin, I'm going to ask you to turn to
17 Plaintiff's Exhibit 77.

18 A. Okay.

19 Q. The document is, that is, Plaintiff's Exhibit 77
20 is captioned copyrights assignment. Do you see that?

21 A. Yes.

22 Q. And is that your signature at the bottom?

23 A. Yes.

24 Q. And what is the date?

25 A. 20th of March, 2012.

1 MR. McGURK: Your Honor, I would move the
2 admission of Plaintiff's Exhibit 77.

3 MR. SCHUVER: No objection, Your Honor.

4 THE COURT: It will be admitted.

5 Q. (BY MR. McGURK) Mr. Kovin, you prepared a
6 declaration in this case; is that correct?

7 A. Yes.

8 MR. McGURK: For clarity, Your Honor, we'd like to
9 introduce the document to clarify one small point. All
10 right?

11 THE COURT: Okay. It's been admitted.

12 MR. McGURK: Plaintiff's Exhibit 76, Your Honor.

13 THE COURT: This is a different exhibit, then?

14 MR. McGURK: Yes, this is the declaration of Mr.
15 Allan Kovin.

16 THE COURT: Any objection, Mr. Schuver?

17 MR. SCHUVER: Subject to cross-examination, no
18 objection.

19 THE COURT: Be admitted.

20 Q. (BY MR. McGURK) Mr. Kovin, this is your
21 declaration that you signed in this matter under oath?

22 A. Exhibit 76 you are referring to?

23 Q. Yes, sir.

24 A. Okay. Yes.

25 Q. I should say subject to the penalty of perjury,

1 referring to paragraph two, it says you have worked with
2 Linda Deeter and her company on various projects for a
3 number of years. Do you see that?

4 A. Yes. That's, that's right.

5 Q. But in fact for clarity, was this the first
6 project that you and Linda Deeter worked on together?

7 A. Yes.

8 Q. That is to say, the DeliverMed project?

9 A. Right.

10 Q. So there's no misunderstanding, it's not as if you
11 had worked prior to the DeliverMed project on this case?

12 A. Correct.

13 MR. McGURK: Your Honor, I would move Plaintiff's
14 Exhibit 76 just for clarity into the record.

15 THE COURT: It's been admitted.

16 MR. McGURK: Thank you.

17 Q. (BY MR. McGURK) Now, Mr. Kovin, the design was
18 used, the logo design was used on various pieces and I'm
19 going to show you some of those. First one I'd like to go
20 to is Plaintiff's Exhibit 39.

21 A. Okay.

22 MR. SCHUVER: I'm sorry, what was the number?

23 MR. McGURK: Plaintiff's Exhibit 39.

24 Q. (BY MR. McGURK) It is a card captioned "thank you
25 for using Medicate Pharmacy DeliverMed." Do you see that?

1 A. Yes.

2 Q. Mr. Kovin, what was your role in terms of setting
3 up such matters as the cards, literature, letterhead and
4 so forth?

5 A. After the logo was established, finalized,
6 approved, we move on to do the letterheads for, the
7 letterhead set for the DeliverMed stationery and also a
8 magnet, what I recall, and some, a few small ads of which
9 this is one of.

10 MR. MCGURK: Your Honor, I would move the
11 admission of Plaintiff's Exhibit 39.

12 THE COURT: Any objection?

13 MR. SCHUVER: No objection.

14 THE COURT: Be admitted.

15 Q. (BY MR. MCGURK) Mr. Kovin, I'd like you to take
16 look at Plaintiff's Exhibit 40, which is a business card.

17 A. Right, I have it.

18 Q. What is Plaintiff's Exhibit 40? Or I should say,
19 in whose name is -- who is the business card for?

20 A. Joe D. Siddle.

21 Q. That's S-I-D-D-L-E?

22 A. Yes.

23 Q. This is one of the items that was designed and
24 prepared by you and Deeter for DeliverMed?

25 A. Yes.

1 MR. McGURK: Your Honor, I'd move the admission of
2 Plaintiff's Exhibit 40.

3 THE COURT: Any objection?

4 MR. SCHUVER: No objection.

5 THE COURT: Be admitted.

6 Q. (BY MR. McGURK) Plaintiff's Exhibit 41, ask you to
7 take a look at that. Now, Mr. Kavin, this is a
8 reproduction of a website page and I'm simply going to
9 ask, is the logo in the upper left-hand corner the same
10 logo that you designed with Linda Deeter?

11 A. Which exhibit?

12 Q. I'm sorry, we're looking at Plaintiff's Exhibit
13 41.

14 A. Okay. And the question, again?

15 Q. The question is, is the logo in the upper
16 left-hand corner the same logo that was designed for
17 DeliverMed?

18 A. Yes.

19 MR. McGURK: Your Honor, I'd move the admission of
20 Exhibit 41.

21 THE COURT: Any objection?

22 MR. SCHUVER: No objection.

23 THE COURT: Be admitted.

24 Q. (BY MR. McGURK) Mr. Kavin, could you please look
25 at Plaintiff's Exhibit 42.

1 A. Okay.

2 Q. What is Plaintiff's Exhibit 42? (Pause.) I'm
3 sorry, Mr. Kovin, what is Plaintiff's Exhibit 42?

4 A. Yeah, I'm looking at it. Do you have a question?

5 Q. Yes. What is Plaintiff's Exhibit 42? Is that one
6 of the magnets that was designed with the logo?

7 A. That's not -- I did a logo magnet. This doesn't
8 look like it, the one that I worked on.

9 Q. All right. Did you understand that there was a,
10 refrigerator magnets that were created with the logo on
11 it?

12 A. Yes, and I did work on that. But it wasn't this
13 one. It doesn't -- this is not --

14 Q. Well, referring to the --

15 A. This has another logo on there.

16 Q. Referring to the logo --

17 A. -- if you look at it --

18 Q. -- on the left --

19 A. -- I don't know what that is and I have nothing to
20 do with that.

21 Q. So the logo on the left at the bottom is the logo
22 that you worked on, the one on the right which I believe
23 says Midwest Operating Engineers you had nothing to do
24 with?

25 A. Right. And I had, the one that I worked on was

1 similar to this but more squattier. This isn't the same
2 one I worked on but, yes, it has my logo on it.

3 MR. MCGURK: Your Honor, I would move the
4 admission of 42 to the extent it refers to the logo?

5 THE COURT: Any objection?

6 MR. SCHUVER: I don't believe there's been any
7 foundation for the admission of it. He doesn't know what
8 this is or where it came from.

9 THE COURT: I'm going to admit it and it will go
10 to the weight, not the admissibility of it.

11 Q. (BY MR. MCGURK) Finally, I'll say the materials
12 subpoenaed, that was included in that.

13 Q. Very well. That is to say you received a
14 subpoena --

15 A. Yeah, the correct version was submitted and it's
16 in that subpoena, subpoena that I had sent, one of the
17 pages in there.

18 Q. We, I'm sure we will be getting to additional
19 documents.

20 Mr. Kovin, who did you intend should have the logo
21 when you signed the assignment in this case?

22 A. Well, it was my understanding that I was designing
23 alongside, you know, with Linda, and we were doing it for
24 a company called DeliverMed which is, was one of Linda's
25 clients. So DeliverMed.

1 MR. McGURK: Thank you, Your Honor. I have no
2 further questions. I'll tender for cross-examination.

3 THE COURT: Mr. Schuver?

4 MR. SCHUVER: Yes, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. SCHUVER:

7 Q. Mr. Kovin, my name is Mark Schuver. We haven't
8 met before; is that correct?

9 A. That's correct.

10 Q. Okay. Can you hear me okay?

11 A. Yes.

12 Q. All right. Mr. Kovin, you have a company called
13 Kovin Design, and that's a commercial art and graphic
14 design firm; is that correct?

15 A. Correct.

16 Q. And you have told us that you are what's called a
17 graphic designer?

18 A. That's right.

19 Q. And a graphic designer is someone who creates
20 visual concepts either by hand or using some computer or
21 computer software. Is that a fair description?

22 A. Yes.

23 Q. Okay. So essentially you're the one who actually
24 puts pen to paper so to speak, you may use a computer to
25 do it but you're the one who does the drawings?

1 A. Yes.

2 Q. Okay. Now you told us you are familiar with Linda
3 Deeter; correct?

4 A. Correct.

5 Q. But this assignment to create this logo, this was
6 the first time you had ever worked with her; correct?

7 A. Yes.

8 Q. Was this also the first time you had worked with
9 her company?

10 A. Yes.

11 Q. Okay. You mentioned her company's name as being
12 Deeter Marketing and Advertising. Is that her company, is
13 that your understanding of her company name?

14 A. They're a marketing and advertising company, is my
15 understanding of their function. And they're called
16 Deeter and Associates. I mean, to be specific, their
17 specific title, maybe the wording may be, may be
18 advertising comes before marketing or marketing before
19 advertising.

20 Q. Okay.

21 A. Basically it's Deeter Associates Marketing and
22 Advertising,

23 Q. Okay. You aren't familiar enough with them or
24 haven't worked with them enough to know their official
25 corporate name?

1 A. No.

2 Q. And Linda Deeter, she's not a graphic designer;
3 is that correct?

4 A. I, I don't know, you know, her background.

5 Q. Okay. William R. Deeter Associates Inc., have you
6 ever heard of that company?

7 A. I'm not familiar with her, I guess that's their
8 corporate name. I'm not familiar with that.

9 Q. Are you aware if anybody with Linda Deeter's
10 company, if they have, even have any graphic designers?

11 A. I'm a freelancer so I don't, you know, I don't
12 ask. I know they have employees. What their job
13 positions are, I, I'm not familiar with.

14 Q. And you have never been an employee of William R.
15 Deeter Associates Inc.; is that correct?

16 A. Only on a freelance basis.

17 Q. But you have never been an employee of William R.
18 Deeter Associates Inc.; is that correct?

19 A. Not a full time.

20 Q. You have never been an employee -- have you
21 received a W-2 from them?

22 A. At the end of the year I receive a W-2, yes.

23 Q. From William R. Deeter Associates Inc.?

24 A. Yes.

25 Q. Are you an employee? Do you consider yourself an

1 employee of William R. Deeter Associates Inc. or are you
2 the owner and employee of your own company Kovi n Design?

3 A. I am the owner and, of my own company Kovi n
4 Design, which is a freelance company, you know. I
5 contract, I do freelance work for other companies. I do,
6 through my 40 years experience I have worked with many of
7 the advertising agencies and marketing agencies. I work
8 directly with corporations like Merck Pharmaceutical as
9 well as work for small -- so my work is done at any
10 capacity as far -- but it is design work, is what I do.

11 So what I'm saying is that I work for whatever
12 company that requests my services, whether they be, you
13 know, a full corporation, I work with them directly, or I
14 can work indirectly for an advertising or marketing
15 company, large or small, such as, you know, the Deeter
16 Associates. And in this particular case, I was called as
17 a freelance designer to help with this particular project
18 and whenever they call me in, that's how it's usually
19 done.

20 The charge -- because it's their client, which is
21 rightfully so, it's not my client, and I meet with her and
22 collaborate with her on whatever the project may be and,
23 you know, I take the role of graphic designer and she's
24 the, you know, art director --

25 Q. Okay. But Mr. Kovi n, when you were doing work,

1 when you did work on this particular logo you were doing
2 it freelance through your company Kovi n Design; correct?

3 A. Correct.

4 Q. Okay. You weren't an employee, they didn't
5 actually hire you, saying, we're putting you on our
6 payroll and we're paying you as an employee of William R.
7 Deeter Associates Inc.; is that correct?

8 A. I was not -- that's what I said, I was not -- I'm
9 not on their payroll.

10 Q. But what you said is --

11 A. I did work for them as freelance.

12 Q. As freelance. And you do that work for various
13 other companies you told us; correct?

14 A. That's, well, correct.

15 Q. On the same basis; correct?

16 A. Correct.

17 Q. All right. And you're not an employee of all
18 those companies, are you?

19 A. No. I'm either a freelance artist or a
20 contractor.

21 Q. Okay.

22 A. I'll have a contract with them or else I'll be
23 called in for a project.

24 Q. All right. So I just want to make it clear, that
25 was the same arrangement that you had when you did this

1 particular project with Linda Deeter.

2 A. Right. I was a freelance designer.

3 Q. Okay. So you told us that you were contacted by
4 Linda Deeter to work on this logo. And all of your
5 communications regarding the logo were with Linda Deeter;
6 correct?

7 A. Yes.

8 Q. You never had any direct contact or communications
9 with a man by name of Mark Swift; is that correct?

10 A. I never spoke with him directly. I made a
11 business card up for him. I saw -- you know, I used his
12 name on one of the business cards for, as DeliverMed --

13 Q. You made up one for Joe Siddle also; is that
14 correct?

15 A. Yes, that's the one that we looked at earlier.

16 Q. And I'm sure you have heard the name John
17 Tollefson, T-O-L-L-E-F-S-O-N, is that fair?

18 A. I don't -- I don't remember every, you know, this
19 is 2008. Or actually this is 2012, that was 2008. I
20 don't remember every name --

21 Q. Okay. You were never an employee of Mark Swift;
22 is that correct?

23 A. Correct.

24 Q. You were never an employee of a company by the
25 name of DeliverMed Holdings LLC; is that correct?

1 A. Yes.

2 THE REPORTER: Could you have him repeat his
3 answer?

4 Q. (BY MR. SCHUVER) Mr. Kovi n, I may have run over
5 you and I didn't mean to. Can you finish your response
6 again so we can get it down?

7 A. I'm not sure where we cut off, so.

8 Q. Why don't you go ahead and just repeat your
9 response.

10 A. Repeat what?

11 Q. Repeat the response. I think I asked you if you
12 were ever an employee of DeliverMed Holdings LLC.

13 A. Right. Okay. No, I was never an employee of
14 DeliverMed.

15 Q. And you never had any written agreement, to this
16 day you have never had any written agreement with Mark
17 Swift or the company DeliverMed Holdings LLC?

18 A. Correct.

19 MR. McGURK: Your Honor, I guess I'm going to
20 object because obviously we have just introduced an
21 assignment that refers to transfer of a logo to DeliverMed
22 Holdings from Linda -- I mean the assignment goes from Mr.
23 Kovi n to Linda Deeter with the intention that it goes to
24 DeliverMed Holdings. So I, I -- to the extent --

25 THE COURT: What's your objection?

1 MR. McGURK: My objection is, he says there's no,
2 no agreement directly between the two.

3 THE COURT: Well, that's for me to decide, isn't
4 it?

5 MR. McGURK: All right, Your Honor. Thank you.

6 MR. SCHUVER: Okay.

7 Q. (BY MR. SCHUVER) And you told us you had no
8 interaction whatsoever with, with Mark Swift in any of
9 this?

10 A. Yes, I never had any interaction.

11 Q. You understood, though, that Linda Deeter was the
12 person communicating with the client; correct?

13 A. That's correct.

14 Q. And the people she was communicating with were
15 Mark Swift and John Tollefson; is that correct?

16 A. Tollefson, I'm not familiar with. I have heard
17 the name Swift but I, I mean, I just -- that was not my,
18 you know, none of my business, my business was with Linda.

19 Q. Okay.

20 A. Whoever she spoke with, that was her client and I
21 had no interaction with them.

22 Q. You understood that all of the work that you were
23 performing with respect to this logo and then the
24 application of the logo on various items, that that was
25 all being done with the approval and consent and

1 authorization of whoever the client was, Mark Swift, John
2 Tollefson, whoever it was that Linda Deeter was
3 communicating with?

4 MR. MCGURK: Your Honor, I guess I'm going to
5 object --

6 A. That's correct.

7 MR. MCGURK: -- Mr. Schuver is suggesting Mr.
8 Tollefson was -- the testimony --

9 MR. SCHUVER: Whoever the client was, Judge, I
10 think that's --

11 MR. MCGURK: Whoever the client was is fine, but
12 when he says, I'm going to throw in Mr. Tollefson, I think
13 that's improper, Your Honor.

14 THE COURT: Why don't you repeat your question.

15 MR. SCHUVER: Sure.

16 Q. (BY MR. SCHUVER) You understood, Mr. Kovin, that
17 the work you were performing, the creation of this logo
18 and then the application of the logo on various items, the
19 magnets, the cards and various things that we'll go
20 through in a minute, that that was all being done with the
21 consent and approval of the client, whoever it was that
22 Ms. Deeter was communicating with?

23 A. Correct.

24 Q. Okay. Sir, I understand that you have a number of
25 exhibits in front of you marked Defendant's Exhibits. I'd

1 I like to start off with Defendant's Exhibit 200, if you can
2 please pull that?

3 A. I don't have that.

4 Q. What's that?

5 A. I just have plaintiff's.

6 Q. You don't have the defendant's exhibits?

7 A. No.

8 MR. McGURK: I sent those yesterday to Linda
9 Deeter, so she has them.

10 MR. SCHUVER: I told you that these were for both
11 their depositions.

12 THE COURT: I don't have 200. Does the witness
13 have 200?

14 MR. McGURK: Your Honor, if it makes things
15 simpler, Defendant's Exhibit 200 and Plaintiff's Exhibit
16 76, which you marked, are identical.

17 THE COURT: Let's use 76 then.

18 MR. SCHUVER: We'll use 76 but, Judge, I, they
19 told us we provided them with all the --

20 THE COURT: Speak into the mike.

21 MR. SCHUVER: Judge, we provided -- counsel
22 initially told us that Mr. Kovin and Ms. Deeter were going
23 to be testifying live. We found out on Monday that they
24 were going to be presented by video now. So we gave them a
25 list and we e-mailed them in PDF form all of the exhibits

1 that we wanted to use with these two witnesses. And we
2 were assured that they would be provided to these
3 witnesses.

4 Now they're telling us that apparently Mr. Kovi n
5 doesn't have any of our exhi bi ts. I can't conduct a
6 cross-exami nation of them wi thout our exhi bi ts. And we
7 were assured that this was going to happen.

8 MR. McGURK: Your Honor, I will attempt to contact
9 the Deeter offices where Mr. Kovi n is right now to make
10 sure that they bring to him whatever documents, if we can
11 have just a moment I can try and do that.

12 THE COURT: We'll take a 5- to 10-minute recess
13 right now.

14 MR. McGURK: Thank you very much, Your Honor.

15 THE CLERK: All rise.

16 (Court recessed from 9:43 a.m. to 9:55 a.m.).

17 THE COURT: Do we have the document situation
18 corrected?

19 MR. SCHUVER: Yes, Your Honor.

20 THE COURT: Mr. Schuver.

21 Q. (BY MR. SCHUVER) Okay, Mr. Kovi n, first of all,
22 is there anybody else in the room with you? The
23 videographer?

24 A. Yes.

25 Q. Is Linda Deeter or anybody from their firm,

1 they're not in the room with you?

2 A. No, all the doors are shut.

3 Q. All right. So let's turn back to Plaintiff's
4 Exhibit 76, which is your title declaration of Allan Kovin
5 subject to penalties of perjury pursuant to 28 USC Section
6 1746. Do you have that in front of you? (Pause.) And
7 that's a two -- oh, I'm sorry, I'll wait for you to get
8 that.

9 A. Okay.

10 Q. Have that?

11 A. Yes.

12 Q. Okay. That's a two-page document; correct?

13 A. Correct.

14 Q. With your signature on the last page?

15 A. Right.

16 Q. And you have told us it's dated March 16, 2012, so
17 just about, what, five, six weeks ago?

18 A. Right.

19 Q. And you didn't prepare this document; correct?

20 A. Myself, no.

21 Q. This was prepared by or was sent to you at least
22 by James McGurk, the attorney that was just
23 cross-examining or just examining you a few minutes ago?

24 A. That's right.

25 Q. And he's not your attorney; correct?

1 A. No, he's not.

2 Q. Okay. Let's start with paragraph four. It
3 states, "In 2008, I was contacted by Linda Deeter, who
4 asked that I work with her on the design of a logo and the
5 design of other written and promotional materials for a
6 client of Deeter by the name of DeliverMed Holdings LLC."

7 Did I read that correctly?

8 A. Right.

9 Q. And the time frame that you were contacted by Ms.
10 Deeter, does March, early March of 2008 sound right to
11 you?

12 A. I know it was 2008. I don't know the month.

13 Q. Okay.

14 A. But if you say it's March, that's, I guess that's
15 fine.

16 Q. Okay. So you say here that you were contacted
17 about the design of a logo and design of other written and
18 promotional materials for a client of Deeter by the name
19 of DeliverMed Holdings LLC. But you were also told about
20 the name of Deliver -- Medicate Pharmacy; is that correct?

21 A. No.

22 Q. That's not correct? You were never told anything
23 about the name Medicate Pharmacy?

24 A. The -- that's going back four years to a specific
25 time, place and time.

1 Q. Okay. Let's refresh your recollection. Do you
2 have Defendant's Exhibit No. 4 in front of you?

3 A. Okay.

4 Q. You have that?

5 A. Yes.

6 Q. Now told us earlier that one of the things you did
7 was you designed some magnets as part of this project;
8 correct?

9 A. Yes.

10 Q. This is a graphic file for one of the magnets you
11 designed; correct?

12 A. Correct.

13 Q. In fact, this is something you produced to us in a
14 subpoena, in response to a subpoena; correct?

15 A. Yes, this is one that I worked on.

16 Q. Okay. And if you read that, it says "thank you
17 for using Medicate Pharmacy DeliverMed"; correct?

18 A. Yes, it does.

19 Q. So in fact you were told the name Medicate
20 Pharmacy in addition to DeliverMed.

21 A. Well, I was presented copy. That's what the copy
22 stated. I wouldn't, you know, remember that. And again,
23 it's going back four years.

24 Q. Okay. You were presented copy and it was your
25 understanding that that copy was something that the client

1 wanted; correct?

2 A. Yes.

3 Q. What you did, you prepared something with the
4 approval and consent of the client; correct?

5 A. My understanding is that, yes.

6 Q. You didn't just come up with, out of thin air to
7 add the name Medicate Pharmacy in front of DeliverMed; is
8 that correct?

9 A. Yes, I did not.

10 Q. You put Medicate Pharmacy on that magnet because
11 you were told that that's what the client wanted on that
12 magnet.

13 A. Correct.

14 Q. And of course we see the logo below that; is that
15 correct?

16 A. Yes.

17 Q. Let's turn to Defendant's Exhibit No. 5.

18 A. Okay.

19 Q. Defendant's Exhibit 5 are two graphic files for
20 two magnets; correct?

21 A. Yes.

22 Q. Again, these are magnets that you redesigned and
23 you created; correct?

24 A. It looks like it, yes.

25 Q. And these state, "thank you for using Medicate

1 Pharmacy DeliverMed"; correct?

2 A. Yes.

3 Q. And of course you were told to put Medicate
4 Pharmacy on these magnets; correct?

5 A. That was the copy supplied.

6 Q. And that was authorized and approved by the
7 client; correct?

8 A. Yes.

9 Q. As was the use of the logo in conjunction with the
10 name Medicate Pharmacy; correct?

11 A. Yes.

12 Q. Let's turn to Defendant's Exhibit 6, please. This
13 is another magnet design; correct?

14 A. Yes.

15 Q. One of yours that you designed; correct?

16 A. I think so.

17 Q. And it says "Medicate Pharmacy offers the right at
18 home pharmacy delivery service"; is that correct?

19 A. Yes.

20 Q. And of course that language, those words were
21 words that you, that you understood were approved and
22 authorized to be put on those magnets by the client;
23 correct?

24 A. Correct.

25 Q. And we see of course the logo on there; correct?

1 A. Yes.

2 Q. And again, the use of the logo in conjunction with
3 the statement "Medicate Pharmacy offers the right at home
4 pharmacy delivery service," that was all approved by the
5 client; correct?

6 A. Yes.

7 Q. At the bottom you put on there, quote, proudly
8 serving Illinois for more than 23 years, close quote. Is
9 that correct?

10 A. That's on there.

11 Q. Do you know how long DeliverMed Holdings LLC had
12 been in existence in 2008 when you created this magnet?

13 A. No.

14 Q. Do you know how long Medicate Pharmacy Inc. had
15 been in existence in 2008 when you created this magnet?

16 A. No.

17 Q. Assuming that Medicate Pharmacy had been in
18 existence for 23 years at this point in time, would it be
19 fair to say that when you prepared this magnet with the
20 house and pestle logo on it, referring to "proudly serving
21 Illinois for more than 23 years" referred to Medicate
22 Pharmacy?

23 MR. McGURK: Your Honor, I'm going to say that
24 calls for speculation.

25 THE COURT: Sustained.

1 You do not have to answer that.

2 THE WITNESS: Yeah, it didn't make sense to me.

3 THE COURT: That is why I sustained the objection.

4 You want my job.

5 Q. (BY MR. SCHUVER) Let's turn to Plaintiff's
6 Exhibit 40. You already looked at this. This is the
7 business card for Joe Siddie; correct?

8 A. Okay.

9 Q. All right. So we have the business card for Joe
10 Siddie. And this is something that you created; is that
11 correct?

12 A. Yes.

13 Q. And it says Joe D. Siddie, Chief Operating
14 Officer, it has the name DeliverMed Holdings LLC and it
15 also has the name Medicate Pharmacy; is that correct?

16 A. It breaking up -- yeah, I see it. Okay.

17 Q. You do see all that language there?

18 A. I do.

19 Q. And of course that was all language that was
20 approved and authorized by the client; is that your
21 understanding?

22 A. Yes.

23 Q. Okay. And we know the client was at least Mark
24 Swift; is that correct?

25 A. You know, no, that's not totally correct.

1 Q. Actually it would be correct that you didn't know
2 who the client was when you were doing this work, you were
3 just doing the work at the direction of Linda Deeter?

4 A. Correct.

5 Q. Okay. And you don't know what relationship Joe
6 Siddle had to DeliverMed Holdings LLC or to Medicate
7 Pharmacy; is that correct?

8 A. I have no --

9 Q. You don't know whether or not Joe Siddle was an
10 employee of either one of those companies?

11 A. I have no clue.

12 Q. Let's look at Defendant's Exhibit No. 207.

13 A. Okay.

14 Q. And just, this is a housekeeping matter. Let me
15 just do this right here.

16 MR. SCHUVER: Judge, we would move for admissions
17 of Defendant's Exhibits 4, 5, 6, and I think those are the
18 only ones that I have gone through that were defendant's
19 exhibits so far.

20 THE COURT: Any objection?

21 MR. MCGURK: No objection, Your Honor.

22 THE COURT: They will be admitted.

23 Q. (BY MR. SCHUVER) Okay, you have Defendant's
24 Exhibit 207 in front of you?

25 A. Yes.

1 Q. And you told us that in addition to the magnets
2 and business cards you also created some advertisements;
3 correct?

4 A. Yes.

5 Q. And of course this is one of them that we
6 obtained, Exhibit 207 is one of them that we obtained from
7 you pursuant to the subpoena; is that correct?

8 A. Yes, this is one.

9 Q. So you created this advertisement; correct?

10 A. Yes.

11 Q. And it says at the top "DeliverMed Medicate
12 Pharmacy offers the right at home pharmacy delivery
13 service"; correct?

14 A. Correct.

15 Q. And again we see the logo in the bottom right-hand
16 corner; correct?

17 A. Yes.

18 Q. And at the very bottom on the left-hand side it
19 says, "proudly serving Illinois for more than 23 years";
20 correct?

21 A. Yes.

22 Q. And this was all done with the authority and
23 approval and direction of the client; is that correct?

24 A. Of Linda.

25 Q. Of Linda?

1 A. Yeah, Linda Deeter.

2 Q. Okay. But you understood or at least she
3 indicated to you that she was getting this from the
4 client?

5 A. Right.

6 Q. Turn to Defendant's Exhibit 208. Do you have that
7 in front of you?

8 A. Yes.

9 Q. This again is another advertisement that you
10 prepared; correct?

11 A. It looks like it, yes.

12 Q. And at the top it says "DeliverMed Medicate
13 Pharmacy"; correct?

14 A. Yes.

15 Q. And we see in the middle the, the house and pestle
16 logo; correct?

17 A. Right.

18 Q. And at the bottom it says, "proudly serving
19 Illinois for more than 23 years"; correct?

20 A. Right.

21 Q. And again, this was done with the direction and
22 approval of the client; correct?

23 A. Linda Deeter, yes.

24 Q. Well, Linda Deeter getting approval from, you
25 understood Linda Deeter was getting approval from Mark

1 Swift?

2 A. If that's the chain of command.

3 Q. Okay.

4 A. I don't know who she was getting her direction
5 from, but I know I was getting mine from her.

6 Q. Then if you'll turn back to Plaintiff's Exhibit
7 39.

8 A. Okay.

9 Q. This is that card that you, that you said that you
10 prepared and you created; correct?

11 A. Yes.

12 Q. And at the very top it says, "thank you for using
13 Medicate Pharmacy DeliverMed"; correct?

14 A. Yes.

15 Q. And in the middle we see of course the house and
16 pestle logo; correct?

17 A. Yes.

18 Q. Again, this is something that was done to your
19 understanding all with the approval and consent of the
20 client?

21 A. Yes.

22 Q. Okay. I'd like to turn back then to Plaintiff's
23 Exhibit 76, which is your declaration.

24 THE COURT: Which is your 200?

25 MR. SCHUVER: My 200 and their 76.

1 A. Okay. You said 77?

2 Q. (BY MR. SCHUVER) 76. This would be your
3 declaration under penalties of perjury.

4 A. Okay. I have it.

5 Q. So, when it states in paragraph four that in 2008
6 you were contacted by Linda Deeter who asked that you work
7 with her on the design of a logo and the design of other
8 written and promotional materials for a client by Deeter
9 by the name of DeliverMed Holdings LLC, it would be fair
10 to say that you also were doing this for Medicate
11 Pharmacy?

12 A. The job was always referred to as DeliverMed.

13 Q. Just DeliverMed, just that name?

14 A. Yes.

15 Q. And then what you put on all the documents was one
16 of two names, either DeliverMed Medicate Pharmacy or more
17 commonly Medicate Pharmacy DeliverMed; correct?

18 A. If you could repeat that again, I would appreciate
19 it.

20 Q. Sure. The various exhibits that we have just gone
21 through had the name DeliverMed Medicate Pharmacy or
22 Medicate Pharmacy DeliverMed; is that correct? And
23 whether they were separate names or one long name, you
24 don't know?

25 MR. MCGURK: Your Honor, I guess I'm going to

1 object, there's confusion.

2 THE COURT: I didn't really understand the
3 question. It's not a good question.

4 MR. SCHUVER: I'll just move on, Judge. That's
5 fine.

6 Q. (BY MR. SCHUVER) You certainly understood in 2008
7 when you were creating all of this work that you were to
8 put the name Medicate Pharmacy on the various materials
9 that we have identified.

10 A. It was in the copy. The, the job that I worked on
11 was, the project was DeliverMed. Now -- and the logo that
12 started, kicked everything off was the DeliverMed logo.

13 Q. Okay.

14 A. DeliverMed is what I was doing it for as far as
15 my, as far as my knowledge goes, but what happened with
16 the copy is an afterthought. I, you know, how they chose
17 to word things are, you know, the client's decision. I
18 just follow whatever they request through the line of
19 chain of command, client to Linda to me. So whatever the
20 composition of the graphic was, whether it be a logo, an
21 ad, a magnet, I was following direction. And if it, so be
22 it, had two names in it or one name in it, that's how it
23 was handled. But as far as the project overall, it was
24 DeliverMed. It was being done for DeliverMed, that's my
25 understanding.

1 Q. I'm sorry. I didn't mean to cut you off. Are you
2 finished?

3 A. Finished.

4 Q. Okay. And you didn't know who Mark Swift was
5 working for or being paid by at that time in March of
6 2008?

7 A. It was not my, any of my concern. I -- he was not
8 part of the project. It was not a graphic.

9 Q. Not, not your concern. Fair enough?

10 A. No.

11 Q. Let's talk about how you came to receive this
12 declaration that's been marked Plaintiff's Exhibit 76. Do
13 you have, can you pull up Defendant's Exhibit 203?

14 A. Okay.

15 Q. Do you have that in front of you?

16 A. Yes, I do.

17 Q. This is an e-mail dated March 7, 2012, just about
18 six weeks ago; correct?

19 A. Yes.

20 Q. It's about nine days before you signed your
21 declaration on March 16; correct?

22 A. Nine days before the declaration?

23 Q. Yes.

24 A. Okay.

25 Q. All right. And this e-mail is from Linda Deeter

1 and it's addressed to you.

2 A. Okay.

3 Q. It starts out saying, quote, "Hi, Alan, seems when
4 we made the DeliverMed logo there were two partners. We
5 worked only with one of them, Mark Swift, and didn't
6 realize there was a second."

7 Do you see that? So do you understand now there
8 were actually two partners at the time you were creating
9 these materials?

10 A. I had no idea of how many partners there were, you
11 know. Again, it was out of my jurisdiction. I just -- I
12 answered to Linda and so, you know, beyond that client
13 contact is her jurisdiction so I had no idea that there
14 were --

15 Q. So, but we know that on March 7, 2012, when you
16 received this e-mail from Linda Deeter, she is informing
17 you that, oh, by the way, there were two partners, we just
18 didn't realize it; correct?

19 A. Yeah, right. I see, I see that.

20 Q. You see that. And so you understood that. Did
21 you, did you disagree with Linda?

22 A. I, I had no knowledge of the partnership and how
23 it was comprised so there was nothing to disagree about.

24 Q. Sure. You had no knowledge back when you were
25 doing the work back in 2008 and other than what Linda

1 Deeter told you in this e-mail on March 7, 2012, you
2 didn't have any other knowledge; correct?

3 A. Not, not that I -- no. No. Not that I could
4 think of. I mean --

5 Q. Why, Mr. Kovin, did you sign the declaration under
6 penalties of perjury nine days after you get this e-mail
7 dated March 7, 2012, advising you that there really were
8 two partners? Why did you sign that declaration?

9 A. The declaration for -- I have to go back and look
10 at the declaration to see what that pertains to. And are
11 you referring to No. 4 in the declaration again? Is that
12 what you are trying to --

13 Q. Let me see which paragraph. (Pause.) Yes, No. 4.

14 A. I'm not sure what you're -- the point you are
15 trying to make is.

16 Q. Well in paragraph No. 4, you signed this, it
17 states that the client was DeliverMed Holdings LLC. But
18 Ms. Deeter in her March 7, 2012, e-mail, nine days before
19 you signed this declaration, is telling you that there
20 were actually two partners, a man by the name of Mark
21 Swift and someone else who she does not identify in the
22 e-mail.

23 THE COURT: Hold on a second. Mr. McGurk?

24 MR. MCGURK: Yes, Your Honor, I'd like to
25 interpose an objection. This is unbelievably

1 argumentative, and I would ask the Court sustain the
2 objection on the basis it's not the appropriate question
3 to ask of this witness.

4 THE COURT: I'm going to -- it's cross-examination
5 so I'll allow the question.

6 Q. (BY MR. SCHUVER) Go ahead, Mr. Kovin.

7 A. Okay, so I mean, I -- DeliverMed is the
8 corporation and as I said I, I don't know how it's made
9 up, comprised of. Whether it's a partnership or -- I
10 don't, I don't see how that's relevant to, to what you are
11 asking me. I mean, I -- it doesn't matter if it's made up
12 of nine people. To me, it doesn't really -- it's
13 DeliverMed that I work for and it was through Linda
14 Deeter. So I, I don't see how I'm perjuring myself here.

15 Q. Well, sir, you knew that there were two partners
16 but she didn't tell you that those were two partners in
17 the same company DeliverMed Holding LLC?

18 A. You're asking me about DeliverMed. No. 9 -- No. 4
19 is, you know, I work with Deeter and her client by the
20 name of DeliverMed. It doesn't really matter how, what
21 they were made up of.

22 THE COURT: Move on.

23 MR. SCHUVER: We'll move on.

24 A. The name is DeliverMed. That's what I've been
25 trying to say to you, DeliverMed. That's who I worked for

1 and I did it through Linda Deeter. So how they were
2 comprised of -- that e-mail you were referring to? That,
3 to me it's irrelevant.

4 Q. (BY MR. SCHUVER) You didn't know who the clients
5 were when you were doing this work back in 2008?

6 MR. McGURK: I'll object Your Honor, it's --

7 THE COURT: It's been asked and answered many
8 times. Next question?

9 A. I don't know why you're pressing me, asking me --

10 THE COURT: Hold on a second. There's no question
11 on the table now.

12 Next question, Mr. Schuver.

13 Q. (BY MR. SCHUVER) Mr. Kovin, referring back to
14 Exhibit 203, defendant's exhibit, third paragraph down,
15 second sentence says, because you are the person who
16 actually put pen to paper. And that's true, isn't that
17 correct? When Linda Deeter said that in her e-mail of
18 March 7, 2012, you're the person who actually put pen to
19 paper?

20 A. Are we looking at the declaration?

21 Q. No, we're looking at Defendant's Exhibit 203, the
22 third paragraph down, second sentence, starts off, quote,
23 because you are the person who actually put, and then she
24 has in quotations, pen to paper, close quote.

25 A. You know, it was a collaboration, you know, with

1 the logo and everything else. And she was the director,
2 the art director, and I was the graphic designer.

3 Q. Linda Deeter -- I'm sorry.

4 A. I put pen to paper but I did it in, you know, with
5 Linda and we worked the logo design together.

6 Q. Linda Deeter didn't do any of the drawings; is
7 that correct?

8 A. Linda is not skilled to work a computer as far as
9 graphics. That's why she hires me. But Linda's input is
10 just as important as far as determining color, you know,
11 typeface, and if I'm going in the right direction as far
12 as the graphic. So it was a, you know, a team effort, you
13 know, we worked together on so I, you know, I may have put
14 pen to paper but her input was just as important as far as
15 the creative. And that's what it is, it was a creative,
16 you know, process.

17 Q. But Linda Deeter did not do any of the drawings;
18 correct? Simple question, did she use a pen, any type of
19 a device to actually make one of the drawings?

20 A. Well, beginning in the process of discussing what
21 this thing could look like we maybe sketched a few things
22 out so, yes, maybe she did use a pen. I don't recall.

23 Q. I'm not asking you maybe. Do you recall Linda
24 Deeter actually making one of the drawings that actually
25 resulted in the logo that we have already identified as

1 Plaintiff's Exhibit 36?

2 A. No, she didn't do the actual drawings, but we
3 marked up --

4 Q. It's a simple question, Mr. Kovi n. Did she do one
5 of the drawings or not?

6 MR. McGURK: Your Honor, I would just ask --

7 THE COURT: Hold. Hold. Hold a second. It --
8 Mr. McGurk and -- Mr. Kovi n, it is a simple question. Can
9 it be answered yes or no? Did, you know, did Miss Deeter
10 put pen to paper on this logo?

11 THE WITNESS: No, she didn't.

12 MR. SCHUVER: Thank you.

13 Q. (BY MR. SCHUVER) Turn to Plaintiff's Exhibit 36
14 again.

15 A. Okay.

16 Q. Do you have that in front of you?

17 A. Yes, I do.

18 Q. It consists of four pages.

19 A. Yes.

20 Q. Now, there's no question that you created this
21 logo in the year 2008; correct?

22 A. Yes.

23 Q. Turn to page two of Plaintiff's Exhibit 36. Have
24 that in front of you?

25 A. Yes.

1 Q. It says, date of first use, January 1, 2006.

2 That's not possible, is it, Mr. Kovin?

3 A. No.

4 Q. That would be a false statement, wouldn't it, Mr.
5 Kovin?

6 A. Correct.

7 Q. Below that it says date --

8 A. You're, you're referring to the logo?

9 Q. That's what this is referring to.

10 A. Okay.

11 Q. Below that it says "date of first use in commerce"
12 and it says January 1, 2006. Again, that's a false
13 statement, isn't it, Mr. Kovin?

14 A. Yes.

15 Q. Turn to page three. It repeats the first thing,
16 date of first use and date of first use in commerce,
17 January 1, 2006; correct?

18 A. Correct.

19 Q. Those are false statements; is that correct?

20 A. Well, assuming the logo was designed in 2008 which
21 is when it was, yes, that would be wrong.

22 Q. You didn't copy this from somebody else, did you?
23 This logo?

24 A. Absolutely.

25 Q. Absolutely not. You're the one who created it and

1 you created it in 2008; correct?

2 A. Yes.

3 Q. And anybody who says it was created and used back
4 in January of 2006 would not be telling the truth.

5 A. Right.

6 Q. Same thing on page four of Plaintiff's Exhibit 36;
7 correct? Same thing, they indicate that first use and
8 first use in commerce were January 1, 2006.

9 A. Right. For this logo, I don't see it, I mean, not
10 possible.

11 Q. And those are false statements; is that correct?

12 A. I don't see it would be possible to be correct.

13 MR. SCHUVER: We'd like the Court to take judicial
14 notice that Plaintiff's Exhibit 36 is a document that was
15 attached to plaintiff's complaint, Document 145.

16 THE COURT: The Court takes judicial notice.

17 Q. (BY MR. SCHUVER) Let's go back again to your
18 declaration, Plaintiff's Exhibit 76.

19 A. Okay.

20 Q. Paragraph seven says -- hold on, let me get it up
21 on the screen for us over here. (Pause.) Paragraph seven
22 says, pursuant to those discussions, I -- and I means you,
23 correct? Allan Kovi n?

24 A. Correct.

25 Q. Pursuant to those discussions, I prepared a series

1 of draft corporate logos.

2 So you are the one who prepared the series of
3 draft corporate logos; correct?

4 A. Right.

5 Q. Turn to Defendant's Exhibit 215.

6 A. I don't have 215 here. It doesn't look like I
7 have 215. I see going up to 201 is my highest number.
8 (Pause.) I don't have 215.

9 THE COURT: I take it these are the series of
10 drafts?

11 MR. SCHUVER: It is.

12 A. I only go up to 202.

13 Q. (BY MR. SCHUVER) I'll see if I can muddle
14 forward, Judge. I don't know if taking a break would help
15 or --

16 THE COURT: We'll take a 5-minute recess, see if
17 we can't get that.

18 215 apparently, Mr. Kovin, is a series of drafts
19 that you prepared.

20 MR. SCHUVER: But there will probably be others --
21 what was the max -- what was the highest number that you
22 said you had, Mr. Kovin?

23 THE WITNESS: 202.

24 THE COURT: What number are you going to?

25 MR. SCHUVER: Let me get my list here that I -- I

1 gave you my list yesterday.

2 THE COURT: We'll take a recess.

3 (Court recessed from 10:34 a.m. to 10:45 a.m.)

4 THE COURT: All right. Let's move on. We're on
5 document, Defendant's 215.

6 Q. (BY MR. SCHUVER) Okay. Mr. Kovin, you have
7 Defendant's Exhibit 215 in front of you; is that correct?

8 A. Yes.

9 Q. And these are the drafts that you prepared of the
10 logo; correct? Of different logos?

11 A. Right. This, this is the, all the different
12 drafts of the DeliverMed logo.

13 Q. And then the last page has kind of a summary of
14 all of the logos all on one page, just kind of some
15 thumbnails?

16 A. Yeah, right.

17 Q. And if you look at the last page, my understanding
18 is the one that the client selected was the one in the
19 upper left-hand corner; correct?

20 A. It looks that way.

21 Q. Okay. Let's go back to your declaration,
22 Plaintiff's Exhibit 76.

23 A. Okay.

24 Q. It says, paragraph nine says, "Linda Deeter chose
25 the colors to be used with the house and pestle logo after

1 consultation with Mark Swift and chose the type font for
2 the promotional material created for the logo"; correct?

3 A. Yes.

4 Q. You didn't know who Mark Swift was up until more
5 recently; correct?

6 A. Yes.

7 Q. So you didn't know who she was in consultation
8 with, whether it was Mark Swift or someone else?

9 A. Um -- yes.

10 Q. Okay. Let's turn to Defendant's Exhibit 24.

11 A. Okay.

12 Q. This is a series of e-mails. I'm looking at the
13 one that starts in the middle of the page, it's dated
14 April 1, 2008, at 4:18 p.m., from Linda Deeter.

15 Do you see that?

16 A. 4:18, yes.

17 Q. And it starts off, "Hi Allan," so this is directed
18 to you; correct?

19 A. Looks that way.

20 Q. And she states in here that they like the concept
21 in the top left of the page with many possibilities on it.
22 The top left of the page, that's what we were just
23 referring to on that composite thumbnail on Defendant's
24 Exhibit 215; correct?

25 A. Yeah, I assume.

1 Q. And "they" means the client; correct?

2 A. I assume, yes.

3 Q. Linda Deeter does not refer to herself as "they,"
4 she was referring to the client is, that what you
5 understood when you received this e-mail?

6 A. Yes, that's what it sounds like to me.

7 Q. Okay. So they, the client, selected the top left
8 logo; correct?

9 A. Yes.

10 Q. Then she goes on to state, that said, they'd like
11 -- I think it's a typo -- it says to, T-0, I suspect it
12 should have been "the", but that said they'd like two
13 colors to be more like the blue and green on the logo with
14 the black bar across the top.

15 Do you see that?

16 A. Right. Mm-hmm.

17 Q. So "they" again is the client; correct?

18 A. Right.

19 Q. And it says they like the colors to be more like
20 the blue and green on the logo, on another logo on your
21 composite sheet; correct?

22 A. Correct.

23 Q. And in fact if you go back to the last page of
24 Exhibit 215 in the area where she indicates in the, like
25 the colors more like the blue and green on the logo with

1 the black bar across the top, that would be the one in the
2 upper right-hand corner?

3 A. I'm looking at it.

4 Q. Okay. So they, the client, selected those colors
5 for the, for the logo.

6 A. Right. There was a lot to choose from, isn't
7 there?

8 Q. You're right. You're the one who put together all
9 of these; correct?

10 A. Yes.

11 Q. As far as putting together, drawing the logos and
12 all these samples that we see in Exhibit 215. Correct?

13 THE COURT: Can you answer that?

14 THE WITNESS: Oh, yes, I did.

15 Q. (BY MR. SCHUVER) Okay. Thank you. Sorry about
16 that. It's a little difficult to communicate so we
17 understand.

18 A. Sure.

19 Q. So, going back to Plaintiff's Exhibit 76,
20 paragraph nine, where you say Linda Deeter chose the
21 colors, you also say that Linda Deeter chose the type
22 font; is that correct?

23 A. Right. There's a lot, you can see there's a lot
24 of different type fonts here to mix and match.

25 Q. And if we look at Plaintiff's Exhibit 36, you will

1 agree with me that there is no type font on that logo.

2 A. Well, I don't know why there's not.

3 Q. Okay. The one in Plaintiff's Exhibit 36 has no
4 type font?

5 A. But there should be. I guess -- incorporates the
6 name of the company --

7 Q. Do you know which logo, which logo was the subject
8 of any copyright or trademark, whether it's the one that
9 you have in front of you as Plaintiff's Exhibit 36 or some
10 other version?

11 A. I'm not sure if I'm understanding.

12 Q. Do you know if -- well, first of all, do you have
13 any knowledge as to whether anyone obtained a, either a
14 copyright registration or a trademark registration on the
15 house and pestle logo? And if you have no knowledge, just
16 tell us.

17 A. None. Nobody contacted me and told me.

18 Q. Fair enough.

19 A. I wouldn't know.

20 Q. All right. Let's turn back to Plaintiff's Exhibit
21 76, your declaration again.

22 A. Okay.

23 Q. And actually we need to turn to the second page, I
24 want to look at paragraph 11. Paragraph 11 states, quote,
25 "I always intended and believed that the client,

1 DeliverMed and Mark Swift would own all rights in the
2 final logo design. "

3 Is that correct?

4 A. That would be correct.

5 Q. But you already told us, you already told us back
6 in 2008 when you were working on this that you didn't
7 really know who Mark Swift was, all you knew is a name
8 DeliverMed.

9 A. Pretty much, until business cards had to be put
10 together, then I saw the name Mark Swift.

11 Q. And you saw the name Joe Siddle; correct?

12 A. I'm sorry?

13 Q. And you saw the name Joe Siddle?

14 A. Right. But that was in the passing. I mean, that
15 was just putting, putting cards together. There was no
16 other attachment as far as knowing who they are or, you
17 know, other than their title, I guess that would be on
18 their card but I wouldn't remember that. I -- maybe the
19 Mark Swift name had come up but there was no reason for me
20 to place special emphasis on remembering it. If that's
21 Linda's client, assuming DeliverMed and, you know, if Mark
22 Swift is her client who she was doing it through, I mean,
23 that's, that's okay, you know, with me.

24 Q. What I'm asking you, sir, is what you knew back in
25 2008 when you worked on this project. Did you actually

1 intend and believe that the client was Mark Swift? Not
2 what you know now but what you knew then.

3 A. Right. You know, again it's going back four
4 years, I don't remember conversations then. Maybe in
5 conversation, and most likely, not just maybe but most
6 likely Linda did mention his name but there's not any
7 reason, you know, since then, and now with all the work
8 that I have done and other clients that I have associated
9 with and all their details and specifics as far as their
10 jobs go that I would remember that in particular.

11 Q. So would it be fair to say that back in 2008 you
12 have no -- you have no recollection of, back in 2008,
13 having any intention with regard to Mark Swift?

14 A. You know, my memory's not that good. I'm sorry.

15 Q. So the answer would be no.

16 A. I don't -- it wouldn't be a general no, it would
17 be a maybe.

18 Q. Nothing you can recall as you are sitting here
19 today testifying under oath?

20 A. Again, Linda had talked about, had spoken to me
21 about the client back then a little bit, giving me a
22 little background, but, you know, having the name pop out,
23 I don't know.

24 THE COURT: He can't remember. Move on.

25 A. I can't give you a definite yes or no on that,

1 that's what I'm saying. I can't.

2 Q. (BY MR. SCHUVER) And Mr. McGurk is the one who
3 actually prepared this for your signature, to your
4 knowledge?

5 A. Right.

6 Q. Okay.

7 A. Well, and -- right.

8 Q. So let's look, let's talk about the house and
9 pestle logo itself. You're familiar with the, the symbol
10 of, of the letter C being in a circle; is that fair?

11 A. Yes.

12 Q. Okay.

13 A. Copyright, yes.

14 Q. That's putting people on notice of a copyright;
15 correct?

16 A. Correct.

17 Q. And at no time did you ever draft this house and
18 pestle logo with that C in a circle symbol?

19 A. No. Never would.

20 Q. And you never put the words copyright or COPR or
21 anything like that --

22 A. No. No. No. Or R in a circle even.

23 Q. Okay. None of those things.

24 A. No.

25 Q. Turning back to Plaintiff's Exhibit 76, your

1 declaration, let's look at paragraph 12. Have that in
2 front of you?

3 A. Yes.

4 Q. It says, quote, to the extent that I had any legal
5 right to the house and pestle design, I have tran -- I
6 have transferred all my rights in the house and pestle
7 logo design to Linda Deeter who has transferred those
8 rights to the client DeliverMed, since that was always my
9 intention and understanding.

10 Did I read that correctly?

11 A. Yes, you did.

12 Q. So you -- this is dated March 16, 2012. And you
13 are saying, I have transferred all of my rights in the
14 house and pestle logo to Linda Deeter. Past tense.
15 Correct?

16 A. Right. Correct.

17 Q. Let's look at Plaintiff's Exhibit 77. That's the
18 document titled copyright rights assignment; correct?

19 A. Right.

20 Q. And your signature at the bottom; correct?

21 A. Yes.

22 Q. But that's dated March 20, 2012; correct?

23 A. That's right.

24 Q. So when you executed this declaration, Plaintiff's
25 Exhibit 76, on March 16, 2012, you had not yet prepared a

1 written document signed by you transferring any rights to
2 Linda Deeter.

3 A. As far as the, all of that goes, I mean, it really
4 goes back to 2008 when I was called in for the project.
5 And it was an understanding at that time, I wasn't under
6 contract, it was verbal, that when I came in to do the
7 project I was doing it for Linda. And what Linda chose to
8 do with the logo after that was up to her. But she was,
9 you know, I assume that she was as honorable as I was as
10 far as our arrangement was, as far as her -- our
11 arrangement and her to her client.

12 So that, you know, I just, I assume that she was
13 going to do the right thing and I was, thought I was doing
14 the right thing and I, you know, I was to design the logo,
15 I was paid by Linda and that was the end of our, you know,
16 relationship as far as the logo went. I was paid for it
17 and when I, the moment I was paid for it, it belonged to
18 Linda as far as I was concerned.

19 Now I thought I did the right thing there, you
20 know, and I assume that Linda was going to carry the baton
21 and do the right thing by her client and not take
22 ownership of, of the logo for herself. And apparently
23 that's what, you know, this is why it was all done
24 verbally and under good faith. I mean, I -- so you know
25 as far as these two papers in front of me, especially the

1 copyright one, even though it was made up later, we had a
2 verbal understanding in 2008 that I design the logo and
3 was paid for it and it was then her logo. What she did
4 with it afterwards was, you know, up to Linda and Deeter
5 Associates. And that's how that came to be. That's --

6 Q. Mr. Kovin, I'd like to you answer my questions, if
7 you wouldn't mind. My question was much simpler. Prior
8 to March 20, 2012 --

9 A. Right.

10 Q. -- did you ever have a written and signed
11 document, written and signed by you transferring any legal
12 rights in the logo?

13 A. No.

14 Q. Okay.

15 A. It was a verbal agreement.

16 Q. Thank you. So nothing written and signed;
17 correct?

18 A. Verbal. Like a handshake. Remember that? The
19 handshake?

20 Q. Are you generally familiar, being a graphic
21 designer, with any copyright laws?

22 A. Yes.

23 Q. You are aware are you not that in order to
24 transfer rights, copyrights, it must be in a written and
25 signed document?

1 A. When, when it's -- yeah, right, okay.

2 Q. Thank you. So let's look at Plaintiff's Exhibit
3 77, which is your copyright assignment. (Pause.) Hold on
4 a second, I need to grab my copy here. Okay. Do you have
5 that in front of you?

6 A. Yes, I do.

7 Q. All right. Third paragraph down says, "I intended
8 that all copyright ownership rights in the house and
9 pestle logo were to be transferred by myself and Linda
10 Deeter to the client, DeliverMed Holdings, LLC"; is that
11 correct?

12 A. Wait a minute. Which document are we on?

13 Q. It's Plaintiff's Exhibit 77, which is titled
14 copyright rights assignment.

15 A. Right. And on which paragraph are we on?

16 Q. It is -- they're not numbered, but it's the third
17 paragraph from the top. And I'll read it to you one more
18 time. It says, "Whereas, I intended that all copyright
19 ownership rights in the, quote, house and pestle, close
20 quote, logo were to be transferred by myself and Linda
21 Deeter to the client, DeliverMed Holdings, LLC"; is that
22 correct?

23 A. That sounds correct.

24 Q. All right. Now in your declaration, paragraph 11,
25 you said you intended it to be transferred to DeliverMed

1 and Mark Swift; is that correct?

2 A. That's what it says.

3 Q. Okay. You don't mention anything about Mark Swift
4 in copyright rights assignment document, Plaintiff's
5 Exhibit 77.

6 A. It's not -- I don't see anyone else's name in
7 there, no. Wouldn't that be -- and Linda Deeter to the
8 client, and that would be Mark Swift then, wouldn't that
9 be correct?

10 Q. I'm just asking you, sir, if the name Mark
11 Swift --

12 A. Mark Swift -- well then that's my understanding,
13 her client, if her client being Mark Swift then Mark Swift
14 would be there.

15 Q. So let's look to see -- I'm sorry.

16 MR. SCHUVER: I didn't mean to cut him off.

17 Q. (BY MR. SCHUVER) Are you done, Mr. Kovin?

18 A. Yes.

19 Q. Okay. Let's look to see who you in fact
20 transferred this to. Let's look at this large paragraph
21 under "therefore." Do you see that? It starts off, "I,
22 Allan Kovin"?

23 A. Yes.

24 Q. It says, "I, Allan Kovin, for good and valuable
25 consideration, receipt of which is hereby acknowledged, do

1 hereby assign, transfer and grant to Linda Deeter of
2 William R. Deeter Associates Inc. all of my rights of
3 copyright, to the extent that they exist, in and to a
4 two-dimensional design known as the house and pestle
5 logo. "

6 And I'll kind of stop right there for right now.
7 So this is transferring to Linda Deeter of William R.
8 Deeter Associates Inc.; correct?

9 A. Yes.

10 Q. Okay. Going back to Plaintiff's Exhibit 76, your
11 declaration, paragraph 12.

12 A. Okay.

13 Q. Got it?

14 A. Yes.

15 Q. You state, "to the extent I had any legal right to
16 the house and pestle design, I have transferred all my
17 rights in the house and pestle design to Linda Deeter who
18 has transferred those rights to the client DeliverMed
19 since that was always my intention and understanding. "

20 Mr. Kavin, when did Linda Deeter transfer those
21 rights to the client DeliverMed?

22 A. I, I don't know.

23 Q. How do you know that Linda Deeter transferred
24 those rights to the client DeliverMed?

25 A. Well, how do I know?

1 Q. Yes.

2 A. I'm sorry. Ask me that last question again.

3 Q. How do you know that Linda Deeter transferred
4 those rights to the client DeliverMed?

5 A. I, I don't know personally, so I -- I mean, I, I
6 guess the attorneys handle that aspect. But I, I wouldn't
7 know.

8 Q. So you just signed this without having such
9 knowledge?

10 A. Well, let me review this again before I commit.
11 (Pause.) Well, I -- I mean, I don't know for sure that
12 she, you know, transferred those rights to DeliverMed.

13 Q. Did you say that she will or that she did?

14 A. Well, since you drafted this, as you mentioned
15 earlier, was McGurk, Attorney McGurk, which is the
16 attorney for DeliverMed, I, I don't think he would put
17 this together unless it were so. Wouldn't you think?

18 Q. Good question, Mr. Kovi n. Mr. Kovi n, you have
19 never seen a written and signed document from Linda Deeter
20 transferring any rights to DeliverMed; is that fair to
21 say?

22 A. That's fair.

23 Q. Okay. And you don't know when Linda Deeter
24 transferred or purportedly attempted to transfer any
25 rights to DeliverMed?

1 A. I mean, the only thing I can think of is looking
2 at the date here, March 16, which wasn't really all that
3 long ago. Doesn't it take a little time to do, do that?
4 That's the only thing I can think of. But otherwise I
5 don't, I don't know.

6 Q. Okay.

7 A. Maybe it hasn't been done yet, that's the only
8 thing I can think of, or maybe it has and I haven't seen
9 it. I really don't know.

10 Q. And just so you know, Mr. Kovin, no one here is
11 asking you to guess, we just want to know what you know
12 and what you don't know. Okay?

13 A. I don't know. I don't know because I, no one's
14 ever shown me anything so I -- and since McGurk is, James
15 McGurk is the attorney for DeliverMed, I, I would imagine
16 that has been taken care of.

17 Q. Okay. Let's go back to Plaintiff's Exhibit 77,
18 the document copyright rights assignment. And that same
19 sentence goes on to state you are transferring and
20 granting to Linda Deeter of William R. Deeter Associates
21 Inc. all of my rights of copyright to the extent that they
22 exist in and to a two-dimensional design known as the
23 house and pestle logo; correct?

24 A. Yes.

25 Q. And the two-dimensional design, that's the design

1 that you drew; correct?

2 A. Yes.

3 Q. Linda Deeter did not draw it; correct?

4 A. No, she collaborated with me on the graphic of it.

5 Q. That's not my question. I didn't ask if she
6 collaborated. I wanted to know, did Linda Deeter draw it?

7 A. No.

8 Q. Thank you. It says that you received good and
9 valuable consideration for this copyright rights
10 assignment. What did you receive, Mr. Kovi n?

11 A. Well, the project was completed and I was paid. I
12 received my compensation. I billed Linda and I, you know,
13 she received an invoice, she paid it, and as I mentioned
14 earlier at that time in 2008 is my understanding that it
15 was hers.

16 Q. So the compensation you received was for doing the
17 work on the project; correct?

18 A. Yes.

19 Q. You completed all of that work back by, I think
20 your last billing was statement of August of 2008. Does
21 that sound about right to you?

22 A. Sounds about right, yes.

23 Q. And you were paid some time in 2008; is that
24 correct?

25 A. I believe so.

1 Q. So you received no compensation for signing this
2 copyright rights assignment in March of 2012?

3 A. I answered that earlier.

4 Q. Did you receive, since March 20, 2012, have you
5 received any compensation from Linda Deeter or anyone else
6 in exchange for signing this copyright rights assignment?

7 A. I received my -- going back to answer you, your
8 question and what I have stated earlier, when I took the
9 project it was a verbal agreement that when I, when the
10 project was completed that I was paid for it, the logo was
11 hers. And she -- you know, and that was my compensation.
12 I was compensated before -- you know, before I was
13 challenged. You are challenging me now and this is why
14 we're going through all of this. But really, this was all
15 accomplished back in 2008 when I did work for the project
16 and I was paid for it, I was compensated back then. And
17 the agreement was that I was designing it for her client
18 DeliverMed and she, and she was, you know, it was hers.
19 It was her logo at that time to do as she pleased with it
20 and that's it.

21 Q. Mr. Kovi n, my question was much simpler. And
22 again, it would be much easier if you'd answer my
23 question. I wanted to know, since March of 2012 have you
24 received any compensation in exchange for this copyright
25 rights assignment?

1 A. We keep going in circles, aren't we?

2 Q. No, we aren't, sir. I'm asking you since March of
3 2012 --

4 A. My answer to you is, I was compensated before
5 March of 2012 or whatever that recent date was.

6 Q. So the answer to my question would be no. Would
7 the answer to my question be no, Mr. Kovin?

8 A. You're making it very difficult for me because I
9 was, I did the project and I was compensated for it and
10 she had the rights back in 2008, you know. There would no
11 reason --

12 THE COURT: The Court understands that he has not
13 received any compensation --

14 MR. SCHUVER: Thank you, Judge.

15 THE COURT: -- for the copyright assignment. The
16 compensation he received was back in 2008.

17 MR. SCHUVER: Thank you.

18 THE COURT: And that will be the finding, one of
19 the findings of this Court.

20 MR. SCHUVER: I appreciate that, Judge. Thank
21 you.

22 THE COURT: Okay?

23 MR. SCHUVER: Thank you.

24 Q. (BY MR. SCHUVER) Mr. Kovin, you talked a little
25 bit earlier about some telephone calls that you received

1 from Ned Randle; is that correct?

2 A. That's correct.

3 Q. And as I understand it, some time in late February
4 of 2012 Mr. Randle attempted to contact you, he left you
5 several voicemail messages asking you to give him a call;
6 correct?

7 A. That's right.

8 Q. And then he called and you picked up the phone on
9 one of his calls finally and, and you did talk to him;
10 correct?

11 A. Correct.

12 Q. Now, earlier when you were asked on direct
13 examination, you couldn't recall whether or not he had
14 told you who he represented. He, in fact, told you that
15 he represented Medicate Pharmacy Inc.; is that correct?

16 A. He probably did. I, you know.

17 Q. Well, let's look at Plaintiff's Exhibit 76, your
18 declaration.

19 A. Okay.

20 Q. Paragraph 13.

21 A. Okay.

22 Q. This discusses your conversation with attorney Ned
23 W. Randle; correct?

24 A. Right.

25 Q. And you state, under penalty of perjury, quote,

1 when I spoke to Mr. Randle, he advised me that he
2 represented Medicate Pharmacy Inc., close quote.

3 Does that refresh your recollection?

4 A. Okay.

5 Q. Okay. And Mr. Randle, he wasn't rude to you, was
6 he?

7 A. Not, not by any means.

8 Q. Not by any means. And, and he, he told you that
9 he was interested on behalf of Medicate Pharmacy Inc. in
10 purchasing the logo; correct?

11 A. Yes.

12 Q. And he was offering you compensation,
13 consideration for doing so; correct?

14 A. Yes.

15 Q. It was your understanding that he initially
16 offered you a thousand dollars; correct?

17 A. Correct.

18 Q. And then he offered \$3,000; correct?

19 A. Yes.

20 Q. And then you politely told him that you aren't
21 interested and you declined the offer; correct?

22 A. Yes.

23 Q. And that was the end of it; is that right?

24 A. That's right.

25 Q. He didn't harass you, call you in the middle of

1 the night, threaten you or anything like that?

2 A. No.

3 Q. And he even told that you there was a dispute
4 going on about the logo and the ownership; correct?

5 A. He explained that to me, yes.

6 Q. Yes.

7 MR. SCHUVER: Judge, just some housekeeping. I
8 think Miss Schrick is keeping track of which exhibits have
9 been admitted. Can she read off --

10 THE COURT: I do have one question --

11 MR. SCHUVER: Oh, yeah.

12 THE COURT: -- for you, Mr. Kovin.

13 EXAMINATION

14 BY THE COURT:

15 Q. Who -- and I think with respect to your
16 declaration which is Defendant's Exhibit 200.

17 THE COURT: What's the corresponding plaintiff's
18 exhibit?

19 MR. MCGURK: 76, Your Honor.

20 THE COURT: Yeah, 76.

21 Q. (BY THE COURT) That you indicated that Mr. McGurk
22 prepared that; is that correct?

23 A. Yes.

24 Q. What about Plaintiff's Exhibit 77, the copyright
25 assignment? Did you prepare that or did someone prepare

1 that for you?

2 A. Mr. McGurk. Now, but please understand that this
3 was done, I had an attorney that was overwriting with Mr.
4 McGurk, was writing here, so you, my attorney reviewed it
5 before I signed.

6 Q. All right. But Mr. McGurk prepared it; is that
7 correct?

8 A. Yes, he prepared it. Prepared it, yes.

9 Q. Okay.

10 MR. SCHUVER: May I have just a minute? Were you
11 finished? I have one more question.

12 THE COURT: I'm through.

13 RECROSS-EXAMINATION

14 BY MR. SCHUVER:

15 Q. The written document that you did sign on March
16 20, 2012, that was in your name, Allan Kovi n, not in the
17 name of Kovi n Design; is that correct?

18 A. The copyri ght?

19 Q. The copyri ght assi gnment?

20 A. Exhi bi t 77; ri ght?

21 Q. Yes.

22 A. And you're asking was that Allan Kovi n of Kovi n
23 Desi gn?

24 Q. You signed at the bottom where your signature is
25 located, you signed as Allan Kovi n?

1 A. Right.

2 Q. Not in the name of Kovi n Desi gn.

3 A. Well, I take it where I , Allan Kovi n, of Kovi n
4 Design have worked with Linda Deeter. So I think it says
5 it on the top and I'm signing it on the bottom.

6 MR. SCHUVER: That's all I have, Judge.

7 THE COURT: Redi rect exami nation.

8 MR. MCGURK: Thank you, Your Honor.

9 REDI RECT EXAMI NATION

10 BY MR. MCGURK:

11 Q. Mr. Kovi n, di d Mr. Randle explai n to you why you
12 had these rights?

13 A. I'm sorry? To whom am I speaking now?

14 Q. I'm sorry. Thi s i s James McGurk speaki ng on
15 redi rect exami nation, Mr. Kovi n. Can you see me?

16 A. Okay, yes.

17 Q. Do you recal l when speaki ng to Mr. Ned Randle i f
18 he di scussed wi th you why he bel i eved you had these ri ghts
19 to the l ogo, to the house and pestl e l ogo?

20 A. I'm starting to feel very worn down here.

21 Q. I'm sorry, Mr. Kovi n. I'II try and be very brief.
22 Do you di spute whether Linda Deeter has any ri ght to
23 copyri ght the l ogo?

24 MR. SCHUVER: Obj ection, cal l s for a l egal
25 concl usi on.

1 A. No.

2 THE COURT: Overruled.

3 Q. (BY MR. MCGURK) Do you dispute whether DeliverMed
4 has any right to copyright the logo based on an assignment
5 from Linda Deeter?

6 MR. SCHUVER: Objection, he's --

7 THE COURT: I'm going -- hold on a second, Mr.
8 Kovin. This is the judge. I'm going to sustain that
9 objection.

10 MR. MCGURK: All right.

11 Q. (BY MR. MCGURK) Now, you became aware there was
12 this pending litigation between the parties?

13 A. Yes, I'm aware of it, yes.

14 Q. Did you give permission to Mr. Michael
15 Schaltenbrand to copyright the house and pestle logo in
16 October of 2009?

17 A. I'm not even familiar with that name.

18 MR. MCGURK: Can we accept that, Your Honor, as a
19 no?

20 THE COURT: Accept it as a no.

21 MR. MCGURK: That's all the questions I have.
22 Thank you very much.

23 MR. SCHUVER: No questions.

24 MS. SCHRI CK: If we could quickly move to the
25 admission of our exhibits. We'd like to tender to the

1 Court --

2 THE COURT: Hold on a second. We can -- Mr.
3 Kovin, you are through. You can go to lunch. Okay?

4 THE WITNESS: Thank you, sir.

5 THE COURT: All right. Okay. Move the admissions
6 of --

7 MS. SCHRICK: We'd like to tender to the Court
8 Exhibits 4, 5 and 6, which were previously admitted, and
9 we would move for the admission of Defendant's 24, 203,
10 207, 208 and 215.

11 THE COURT: Any objection?

12 MR. MCGURK: No objection.

13 THE COURT: They will be admitted.

14 THE CLERK: I also have 47.

15 THE COURT: 47?

16 THE CLERK: The fax.

17 MR. SCHUVER: I didn't refer to that.

18 MS. SCHRICK: I think that's it.

19 THE CLERK: Okay. You didn't want 200?

20 MR. SCHUVER: 200 is admitted.

21 MS. SCHRICK: 200 is previously admitted and we
22 would be tendering the original to the court file but I
23 think that was previously admitted.

24 THE COURT: 200 is a previous exhibit.

25 THE CLERK: I realize that, but I didn't know they

1 admitted theirs.

2 (Off the record.)

3 (Witness sworn by clerk.)

4 THE WITNESS: Linda Deeter, D, as in David,
5 double-E, T, as in Tom, E-R.

6 THE CLERK: Thank you.

7 LINDA DEETER,

8 having been first duly sworn, was examined and testifies
9 as follows:

10 DIRECT EXAMINATION

11 BY MR. McGURK:

12 Q. Mrs. Deeter, what is the name of your company?

13 A. William R. Deeter Associates Inc.

14 Q. What is the working title used by the company?
15 What is the company known as day to day?

16 A. We are known as Deeter.

17 Q. Just Deeter.

18 A. Just Deeter.

19 Q. What is your position with William R. Deeter
20 Associates Inc.?

21 A. I'm an executive vice president.

22 Q. And who is Mr. William R. Deeter?

23 A. My husband.

24 Q. Can you briefly describe your educational
25 background?

1 A. Yes. I have a Bachelor of Science degree in
2 Education from Kutztown University here in Pennsylvania.

3 Q. Can you briefly describe your work experience?

4 A. My work experience. I have been working here at
5 Deeter since 1990. Prior to that I sold advertising and I
6 was a teacher and a business owner.

7 Q. In terms of employment, have you ever been an
8 employee of Medicate Pharmacy Inc. of East St. Louis and
9 Washington Park, Illinois?

10 A. No.

11 Q. Have you ever met Mr. Michael L. Schaltenbrand?

12 A. No.

13 Q. Have you ever been an employee of Mr. Michael L.
14 Schaltenbrand?

15 A. No.

16 Q. Can you describe for us the work of Deeter?

17 A. We are a strategic public relations and
18 advertising firm, sometimes called marketing
19 communications.

20 Q. And where is Deeter located?

21 A. We are located in Doylestown, Pennsylvania.

22 Q. And that is where you are currently located for
23 this testimony; is that correct?

24 A. Yes, that is correct.

25 Q. Do you know Mr. Mark Swift?

1 A. Yes.

2 Q. How do you know Mr. Swift?

3 A. I know Mr. Swift through my son Kirk.

4 Q. What does your son Kirk do?

5 A. Kirk is a writer and editor of magazines.

6 Q. What magazine?

7 A. Well, right now he just got another great job,
8 he's Editor At Large of Field and Stream magazine, and
9 he's also the Editor of Trout, which is the national
10 magazine for Trout Unlimited.

11 Q. When did your son introduce you to Mr. Mark Swift,
12 if you recall?

13 A. I believe that was in 2007.

14 Q. Do you recall working with Mr. Mark Swift in a
15 professional manner?

16 A. Yes.

17 Q. When did you first start working with Mr. Swift?

18 A. In 2007.

19 Q. Can you describe the project?

20 A. We worked on a brochure for him.

21 Q. What was the name of his company?

22 A. I believe it was Express Meds.

23 Q. Did you, when you say, we worked on a brochure,
24 can you describe what you did?

25 A. We did the graphic design work for a brochure for

1 his company.

2 Q. Turning your attention to 2008, were you contacted
3 by Mr. Mark Swift for a project?

4 A. I was contacted by John Tollefson on behalf of
5 Mark Swift for, to design a logo.

6 Q. For what entity?

7 A. For a company named DeliverMed.

8 Q. Can you describe what you understood the project
9 to be?

10 A. I understood that they needed a new, a logo, a
11 look, for a company named DeliverMed, and that we were
12 going to give them several options on what that could be
13 and to get it designed for them.

14 Q. Did this also include marketing material and
15 letterhead, business cards?

16 A. It included what we call an identity. And when
17 you are doing branding or an identity for a company you
18 start out with the logo and then you apply that to various
19 materials, including business cards, letterhead, that type
20 of thing.

21 Q. What did you do after you received this
22 assignment?

23 A. When I received the assignment, I thought about
24 which designer I would work with on this. We work with
25 several different designers in our company and I chose the

1 one to work with, called that person in and went over what
2 we were doing and began to work.

3 Q. Who was the designer that you contacted?

4 A. We contacted a man named Allan Kovi n of Kovi n
5 Design.

6 Q. Can you describe the meeting with Mr. Kovi n?

7 A. I had him come to our office, explained what we
8 were attempting to do, what our assignment was, and asked
9 -- and gave him information that I knew about the company
10 and what they did. I understood it to be a pharmaceutical
11 company that delivered prescription medication to people's
12 homes, and I told him what we knew about it and asked him
13 to give us some design options to, to start work on
14 developing this logo.

15 Q. Did you ever sketch out any ideas on paper,
16 thumbnails, any, anything in writing at all?

17 A. I'm not the designer. I'm more of the director
18 than the designer. No, I --

19 Q. How would you describe, how would you describe
20 your position as an art director?

21 A. If we were a large agency, I would be called an
22 art director. But because we are a small agency, I do
23 several things, including directing art. And as the art
24 director, I'm the one that makes the assignments to the
25 graphics designers and work, I'm the direct contact with

1 the client and communicate and help develop the logo that
2 they need. So I direct the project.

3 Q. What did Mr. Kovi n do after your meeting?

4 A. He took the information that we had, that I had
5 given him, and came back and gave us several options for a
6 possible design.

7 Q. A possible -- several options for a possible
8 design of a logo; is that correct?

9 A. That's correct.

10 Q. And by the way, in terms of the process, you, you
11 indicated that, that there was a identity for a whole
12 series of different things but the first thing you start
13 with is the logo; is that correct?

14 A. Yes.

15 Q. Who selected the design, the final design to use
16 for the logo for DeliverMed?

17 A. As far as I know, it was Mark Swift and John
18 Tollefson.

19 Q. Did you present various alternatives to them?

20 A. Yes, I did.

21 Q. Did you make recommendations to them?

22 A. Yes, I did.

23 Q. Let me ask the question this way: How many
24 different potential designs did you present?

25 A. Can I look at the exhibit for exact number?

1 Q. Best you can recall at this point.

2 A. 15 to 20?

3 Q. Now, who selected the colors for the logo?

4 A. It's always a collaborative effort. When we
5 presented the options, there were several different
6 designs in several different colors. And when they
7 decided upon the house, I believe originally the house
8 wasn't in the colors that it ended up with, but we liked
9 colors from another one. And we massaged the colors and
10 came up with the ones that we felt would work best.

11 Q. Who selected the type font for the name?

12 A. That was very much like colors --

13 THE COURT: Hold on. There's an objection.

14 MR. SCHUVER: Objection. What type font?

15 MR. MCGURK: Back up.

16 Q. (BY MR. MCGURK) Was there a type font selected for
17 the logo?

18 A. Yes, there was.

19 Q. And who selected the type font for the logo?

20 A. Again, it was a collaborative effort. They were
21 given several fonts to choose from on the original sheet.
22 They're called boards. And we presented them separately
23 so that they could see different designs and different
24 logo, different type font, and then we worked with the
25 ones they liked and put them together. It's always

1 something that we work with someone, so it's hard to say
2 exactly who chose, chose what. It's a team effort.

3 Q. I'm going to ask you if you can pull out
4 Plaintiff's Exhibit 36 in the stack of materials.

5 A. Yes, I have it.

6 Q. Plaintiff's Exhibit 36 has previously been
7 introduced into evidence. Is this the house and pestle
8 logo without any text?

9 A. Yes, it is.

10 Q. When the house and pestle logo was designed, did
11 it include text?

12 A. Yes.

13 Q. I'm going to place it on the overhead and ask you
14 to look at Exhibit 47. Plaintiff's Exhibit 47.

15 A. Okay.

16 Q. That's a series of materials. Are those, do those
17 materials all reflect the house and pestle logo that was
18 ultimately selected?

19 A. (Pause.) Yes, they do.

20 Q. I note on the first page of the Exhibit 47, the
21 house and pestle logo, there at the very, very bottom you
22 see a tiny little emblem? Do you know what that is?

23 A. On the business card?

24 Q. That's correct.

25 A. Beneath, beneath the Medicate Pharmacy there's a

1 little bitty logo?

2 Q. Yes.

3 A. Is that what you referring to?

4 Q. Yes, ma'am. What is that?

5 A. That's -- I -- I recognize that as the union logo
6 that a union printer would put on a card that they print.

7 Q. Do you know whether that was one of the
8 requirements on this project for business cards and
9 materials? That is to say, to use a union printer?

10 A. Did it require -- excuse me?

11 Q. Did you understand that one of the requirements
12 was to use a union printer, have a union bug logo on the
13 cards?

14 A. We were requested to print, actually print cards,
15 and to find a union printer who could put that, what we
16 call a bug, on the cards, yes.

17 Q. I'm going to put on the screen Plaintiff's Exhibit
18 47.

19 MR. SCHUVER: That's just another page --

20 MR. McGURK: I'm sorry, Plaintiff's Exhibit 46. I
21 apologize. Plaintiff's Exhibit 46.

22 A. Yes.

23 Q. (BY MR. McGURK) Is this an example of some of the
24 advertising material that was prepared?

25 A. No. We did not prepare this.

1 Q. You did not prepare this?

2 A. We did not.

3 Q. All right. In 2000 -- 2011, did you sign an
4 agreement for assignment of copyright?

5 A. Yes.

6 Q. I'm going to ask you to turn to Plaintiff's
7 Exhibit 44. This is an agreement for assignment of
8 copyright.

9 A. Okay. I have it.

10 Q. All right. And turning to the second page of
11 that.

12 MR. SCHUVER: Objection --

13 Q. (BY MR. MCGURK) Whose signature is that?

14 THE COURT: Hold on a second.

15 MR. SCHUVER: Counsel, this has never been
16 produced to us.

17 MR. MCGURK: Plaintiff's Exhibit 44.

18 MR. SCHUVER: Judge, this was produced to us
19 without a signature. And we have asked multiple times,
20 including in Miss Deeter's deposition. And now suddenly
21 one is mysteriously appearing here in court with a
22 signature on it. We asked for this multiple times, in
23 e-mails and in the deposition itself.

24 MR. MCGURK: Your Honor, all of these documents
25 that bear the plaintiff's exhibit numbers were produced by

1 my co-counsel Mr. Courtney Cox to the Mathis Marifian firm
2 in advance of the trial. We can get the specific date of
3 that, if the Court would like to take the time.

4 MR. SCHUVER: Judge, they had bate stamp numbers
5 on their production. This document has no bate stamp
6 numbers. We have asked for this several time. We know --

7 THE COURT: Do you have an unsigned copy of this?

8 MR. SCHUVER: Yes. It's always been unsigned,
9 Judge. Well, I haven't read to see if this is the exact
10 one, but what we do have is a document that's titled the
11 same but it's unsigned. We cross-examined Miss Deeter in
12 January on this issue and she said she couldn't locate it.

13 THE COURT: Couldn't locate what?

14 MR. SCHUVER: A signed copy. She says she has a
15 copy but not, she never found a signed one.

16 THE COURT: Okay. Well the Court will --

17 MR. SCHUVER: We'd move to strike it, Judge.

18 MR. MCGURK: Your Honor, a moment, please?

19 (Off the record.)

20 MR. COX: Your Honor, I would have to get on my
21 computer and check the e-mails I sent to Miss Schrick with
22 all the exhibits that we sent to verify that.

23 THE COURT: When did you send the exhibits? How
24 long have you been in this case? When did you come into
25 this case, Mr. Cox?

1 MR. MCGURK: October --

2 MR. COX: I don't recall the date. It's been some
3 time.

4 THE COURT: Well, let's talk about what year.

5 MR. COX: Well, what we did recently, Judge --

6 THE COURT: You're not answering my question.

7 MR. COX: I don't know.

8 THE COURT: Was it 2012? 2011?

9 MR. COX: 2011.

10 THE COURT: Was it winter, spring, summer or fall?

11 MR. COX: I don't know, Judge. I'm sorry. I can
12 look at my entry of appearance on the docket sheet.

13 THE COURT: Okay.

14 MR. COX: But I can tell you what I was doing was
15 transferring exhibits to Ms. Schrick as we went along,
16 providing her documents. I did that by e-mail. She and I
17 were the ones transferring documents back. To answer a
18 question about whether I produced something, I can go back
19 and look at those exhibits and see where I sent that
20 exhibit.

21 MR. SCHUVER: Judge, we took Ms. Deeter's
22 deposition on January 16 and January 19 of this year. Mr.
23 Cox and Mr. McGurk were both present. They -- Ms. Deeter
24 was asked to produce all of the documents relative to this
25 case. She produced an unsigned copy of an agreement for

1 assignment of copyright. I cross-examined her extensively
2 on whether she could find or locate a signed copy. We
3 completed on April 16th. We took a couple of days off and
4 then we took, when she came back on April 19 and her
5 deposition was completed and she told us she could not
6 find one.

7 We asked repeatedly both Mr. McGurk and Mr. Cox,
8 we told them, look, if you have a signed one, get it to
9 us. It has never to our knowledge been produced. If it
10 had been, they should have brought it to our attention.

11 I don't know where this came from, Judge. But we,
12 we have been prepared for our case to the effect there is
13 no signed copy.

14 THE COURT: Okay. Well, the Court will reserve
15 ruling on your motion to strike this document, go ahead
16 and allow Mr. McGurk to question on it. In the meantime,
17 Mr. Cox, I want you to find out at what point in time you
18 transferred and what you transferred Plaintiff's Exhibit
19 44.

20 MR. COX: I will check, Judge.

21 THE COURT: And the form it was in. Okay?

22 MR. COX: I'll do that right now.

23 THE COURT: All right.

24 MR. COX: And if you don't mind, I'm going to step
25 out with my computer --

1 THE COURT: That's fine.

2 MR. COX: -- and, and do that.

3 THE COURT: That's fine.

4 THE COURT: Mr. McGurk, you can go ahead and
5 examine.

6 MR. MCGURK: Thank you very much, Your Honor.

7 Your Honor, I'm simply going to ask the witness to
8 acknowledge Mr. Swift's signature on the last page of this
9 exhibit. And I don't believe that there's been any
10 concern because I know this has been produced, was part of
11 the package, so --

12 MR. SCHUVER: I don't recall Mr. Swift's signature
13 being on it either.

14 MR. MCGURK: Well then, Your Honor, I guess we'll
15 come back --

16 THE COURT: Hold on a second. Do you have a copy
17 of what was produced to you?

18 MR. SCHUVER: Absolutely.

19 THE COURT: Let me see what was produced to you.

20 MR. MCGURK: I would ask if the defendants could
21 bring up their copy of Plaintiff's Exhibit 44.

22 THE COURT: That's what I'm asking for right now.

23 MR. SCHUVER: Give me a minute here, Judge.

24 THE COURT: I'm kind of puzzled why this isn't
25 handy if you knew Miss Deeter was testifying, Mr. Schuver.

1 I'm puzzled why you can't put your hands on it right away.

2 MR. SCHUVER: Judge, I've got a box of exhibits so
3 I'm just trying to find my list of all of my exhibits.

4 It's on a notepad.

5 THE COURT: Appreciate your patience, Miss Deeter.

6 THE WITNESS: Okay.

7 (Pause.)

8 MR. SCHUVER: It's not even the same document,
9 Judge.

10 THE COURT: Hold on a second. Hold a second. Put
11 it back in there.

12 MR. SCHUVER: Okay.

13 THE COURT: Is that marked as a defendant's
14 exhibit?

15 MR. SCHUVER: Yes, Judge.

16 THE COURT: Is that the entire document?

17 MR. SCHUVER: Yes.

18 MR. MCGURK: I'm sorry, Your Honor, defendant's
19 exhibit or plaintiff's exhibit.

20 THE COURT: Well, they have there -- what do you
21 have there, Mr. Schuver? And first of all, before you
22 show it to me, show it to Mr. McGurk.

23 MR. SCHUVER: Sure.

24 MR. MCGURK: I agree that Plaintiff's Exhibit 44
25 and Defendant's Exhibit 9 are not the same document. That

1 I will agree to, Your Honor.

2 MR. SCHUVER: May I present this, Judge?

3 MR. MCGURK: Can I ask if you could please get the
4 copy of Plaintiff's Exhibit 44 that we provided to you,
5 that you have.

6 THE COURT: Yeah, I look for Plaintiff's Exhibit 44.

7 MS. SCHRICK: This is what we received from the
8 box that I received from Diane on Monday.

9 MR. SCHUVER: This is this Monday?

10 MS. SCHRICK: I don't know if it came by e-mail
11 but this was in the box.

12 MR. SCHUVER: This was this Monday.

13 MS. SCHRICK: It may have come by e-mail, I don't
14 know --

15 THE COURT: Do you have Plaintiff's Exhibit 44?
16 That's my question. That -- supposedly, you were supposed
17 to provide all of your exhibits to the plaintiff, the
18 plaintiffs are supposed to provide all of their exhibits
19 to the defendant. Do you have Plaintiff's Exhibit 44 that
20 was supposedly transferred to you?

21 MR. SCHUVER: As of this Monday, Judge, we do.

22 THE COURT: Okay. Where is it?

23 MS. SCHRICK: Right here.

24 MR. SCHUVER: She has a copy of it, Judge.

25 THE COURT: Okay. Let me look and see what that

1 is. Is that a signed copy? Let me see. (Pause.) Yes,
2 it is. So you received a copy of this on --

3 MR. SCHUVER: Monday, Judge, by e-mail.
4 Unfortunately we were here so --

5 THE COURT: Now, during discovery what did you
6 receive?

7 MR. SCHUVER: May I hand it to the Court?

8 THE COURT: Yes.

9 MR. SCHUVER: I have, during discovery we received
10 what's been marked as Defendant's Exhibit No. 9.

11 MR. STINE: And, Mark, we may have received that
12 earlier than Monday via e-mail but not in discovery. I
13 mean, it was right before trial. I don't know that.

14 MS. SCHRICK: We do know it was in the box --

15 THE COURT: Okay, now, was this in response to a
16 request for production?

17 MR. SCHUVER: It -- when we took Miss Deeter's
18 deposition, we did it as a Rule 30(b)6 as the corporate
19 representative for William R. Deeter Associates. And we
20 also attached to there a request for documents and we
21 requested all written agreements and assignments. And
22 this is what was produced, is Defendant's Exhibit No. 9.

23 THE COURT: And this is what you questioned her on
24 during the deposition?

25 MR. SCHUVER: Exactly.

1 THE COURT: Had you, up until the day before this,
2 or the day this trial started or the weekend before, had
3 you ever seen Plaintiff's Exhibit 44?

4 MR. SCHUVER: I had not seen it, Judge.

5 THE COURT: Okay. I'm -- I will take your motion
6 to strike under advisement and going to continue to allow
7 Mr. McGurk to examine on it.

8 Q. (BY MR. MCGURK) Ms. Deeter -- Mrs. Deeter, could
9 you please turn to page, the second page of the document
10 marked Plaintiff's Exhibit 44?

11 A. Okay.

12 Q. Is that your signature?

13 A. It is.

14 Q. And what is the date?

15 A. April 8th, 2011.

16 Q. And turning to the last page of the document,
17 whose signature is that?

18 MR. SCHUVER: Objection, foundation.

19 Q. (BY MR. MCGURK) If you know.

20 THE COURT: If she knows.

21 A. Mark Swift.

22 Q. (BY MR. MCGURK) Do you recognize Mark Swift's
23 signature?

24 MR. MCGURK: Wait. Your Honor, we'll cover this
25 with Mr. Swift.

1 THE COURT: Okay.

2 MR. McGURK: All right?

3 Q. (BY MR. McGURK) Now, were you -- are you aware
4 that a copyright application, certificate for registration
5 was filed on behalf of DeliverMed for the house and pestle
6 logo, based on that assignment?

7 A. Would you repeat the question?

8 Q. I'm sorry, Mrs. Deeter. Were you aware that based
9 upon the assignment that DeliverMed Holdings filed for a
10 certificate of registration, copyright registration for
11 the house and pestle logo?

12 A. I don't think I really understand the, the
13 question.

14 Q. Yes, ma'am. You understand that there was an
15 agreement for the transfer, assignment of the copyrights
16 rights to DeliverMed Holdings?

17 A. To Mark Swift.

18 Q. And Mark Swift?

19 A. Yes. Yes.

20 Q. And that as a part of that, a copyright
21 application was filed by DeliverMed Holdings.

22 A. Yes.

23 Q. I'm going to ask the Court and ask the parties to
24 turn to Plaintiff's Exhibit 38, which is a certificate of
25 registration for the house and pestle logo. If you would

1 turn to page one of that document. That --

2 A. What exhibit is this, please?

3 Q. Plaintiff's Exhibit 38.

4 A. All right.

5 Q. Do you see the listing author?

6 A. Linda Deeter.

7 Q. And do you see the date of first publication?

8 A. [Inaudible.]

9 THE REPORTER: Ask her to repeat that, please.

10 Q. (BY MR. MCGURK) Could you repeat that?

11 A. June 1st, 2008.

12 MR. MCGURK: Your Honor, I would move the
13 admission of Plaintiff's Exhibit 38, certificate of
14 registration. This is obviously public record document
15 and this is the issue and dispute in the case.

16 MR. SCHUVER: No objection.

17 THE COURT: Be admitted.

18 Q. (BY MR. MCGURK) Now turning to March of 2010, do
19 you recall receiving a telephone call from Mr. Michael
20 Schaltenbrand at your offices in Pennsylvania?

21 A. Yes.

22 Q. What did he say to you and what did you say to
23 him?

24 A. Well, it regarded the logo and he wanted to know
25 if I would, would tell him the logo was his.

1 Q. Did he have anyone with him on the telephone call?

2 A. I do not know.

3 Q. What did you do?

4 A. Well, I didn't know who he was.

5 Q. You did not know who he was?

6 A. I did not know who he was. The call was a
7 surprise to me. And I spoke with him and then, then I
8 hung up from talking with him. I talked to my husband and
9 I told him what had happened, and then I called John
10 Tollefson and Mark Swift.

11 Q. In 2008 when the logo was first created, who did
12 you intend the ownership of the logo to go to?

13 A. To Mark Swift.

14 Q. Did you regard Mark Swift and DeliverMed to be the
15 same thing?

16 A. I do, yes.

17 Q. Did you submit a bill to DeliverMed Holdings for
18 your work in 2008?

19 A. Yes.

20 Q. All right. I'm going to ask you to turn to
21 Plaintiff's Exhibit 45. I'll put that on the document
22 camera.

23 A. I have it.

24 THE COURT: I thought I've seen that bill before,
25 though?

1 MR. McGURK: It has been attached to numerous
2 pl eadi ngs.

3 THE COURT: Okay.

4 Q. (BY MR. McGURK) Mrs. Deeter, what is the date of
5 Pl ainti ff' s Exhi bi t 45?

6 A. It's dated October 17th, 2008.

7 Q. And to whom is the bill addressed?

8 A. It's addressed to Mr. Mark Swi ft, Del i verMed
9 Hol di ngs LLC.

10 Q. What is the address?

11 A. John Hancock Center, Sui te 3100, 875 North
12 Mi chi gan Avenue, Chi cago, Ill i noi s, 60611.

13 Q. Reading the first line -- there's a line across
14 the bill and then there's a description. Can you tell us
15 what that description is, or read to us what the
16 description is?

17 A. That first line item is a logo/mark, and the fee
18 is \$4,025.

19 Q. And can you read the line of text above that?

20 A. Design and production work from January through
21 September 2008.

22 Q. So this covers the, the project for DeliverMed
23 concerning the logo?

24 A. Yes, it does.

25 Q. Can you tell us what the charges are below that?

1 The next entry I believe, update brochures. Can you tell
2 us what that refers to?

3 A. Yes. It says update brochures, and that was where
4 we took older brochures and put the new logo on them.
5 Business cards, design, production, printing and ship
6 something; new look business cards that we mailed
7 overnight; No. 9 envelopes; ads for publication; business
8 cards with union logo, design, print, ship; business card;
9 magnet art; and the logo in black and white. Black white
10 logo.

11 Q. You see the entry that says update brochures? Do
12 you see that entry?

13 A. Yes.

14 Q. Does this have anything to do with the brochures
15 you did for Express Meds earlier in 2007 that you had
16 mentioned to us earlier?

17 A. Yes.

18 Q. So essentially you took that work and basically
19 put the new logo on to use for this project?

20 A. Yes.

21 Q. In terms of the logo, I'm going to ask you to turn
22 to Plaintiff's Exhibit 41.

23 A. I have it.

24 MR. McGURK: Can I simply move for the admission
25 of Exhibit 45?

1 THE COURT: Sure. Be admitted.

2 MR. SCHUVER: No objection.

3 Q. (BY MR. MCGURK) All right. I'm turning to
4 Plaintiff's Exhibit 41. This is a website page. What is
5 the logo in the left-hand corner? What is that?

6 A. The logo in the top left is the DeliverMed logo.

7 Q. Now you see below that the, the word Medicate
8 Pharmacy? Do you see that?

9 A. I do.

10 Q. Was Medicate Pharmacy the entity that you sent the
11 bill to?

12 A. No.

13 Q. Was, in your view, was the client Medicate
14 Pharmacy or was the client DeliverMed Holdings LLC and
15 Mark Swift?

16 A. The client was DeliverMed Holdings and Mark Swift.

17 Q. Are you aware that in October 2009 Mr. Michael L.
18 Schaltenbrand filed a copyright identifying himself as the
19 author of the house and pestle logo?

20 A. I was made aware of that when I was asked to get
21 involved, when, when I did my deposition and the
22 discovery. I did not know that before.

23 Q. Had you ever authorized Mr. Michael L.
24 Schaltenbrand to own the copyright on the house and pestle
25 logo in October 2009 or any other time?

1 A. No.

2 Q. Did you have a written agreement with Mr. Michael
3 L. Schaltenbrand to --

4 A. No.

5 Q. -- copyright the logo?

6 A. No.

7 Q. And I think we have already confirmed that you
8 were never an employee of Mr. Michael L. Schaltenbrand.

9 A. No. That's correct, I was not.

10 MR. McGURK: Your Honor, those are all the
11 questions I have. I'd submit the witness for cross.

12 THE COURT: How long is cross going to take?
13 Going to take awhile?

14 MR. SCHUVER: Yes.

15 THE COURT: We're going to take -- the court
16 reporter needs to rest her fingers. We're going to take
17 about a 20-minute recess and then we're going to continue,
18 begin the cross, because I think we have another video
19 conference at 1:30.

20 MR. McGURK: That's correct.

21 THE COURT: So we're going to try to get through,
22 but we do need to take a break for the court reporter.

23 (Court recessed from 12:09 p.m. to 12:34 p.m.)

24 THE COURT: Okay. Mr. Schuver.

25 MR. SCHUVER: Thank you, Judge.

1 THE COURT: May I make a statement on the record.

2 THE COURT: Yes.

3 MR. SCHUVER: I'm going to fall on my sword,
4 Judge. We have reviewed our e-mails and apparently on
5 March 28 of this year Mr. Cox's office did e-mail that
6 signed document that has been marked Plaintiff's Exhibit
7 44 to our office, so we had it on March 28. We did not
8 have it when we took Ms. Deeter's deposition and she
9 couldn't find it at that point in time. But apparently in
10 the deluge of all the exhibits that have been going, I'm
11 apologizing to the Court and to counsel that we did
12 receive it on March 28 of this year.

13 THE COURT: Okay.

14 MR. COX: And that's the day I received it from
15 Miss Deeter's attorney and we had sent it on immediately
16 so that -- and I got in the case in October of 2011.

17 MR. SCHUVER: I got in it in January, Judge, of
18 2012.

19 THE COURT: Okay. Miss Deeter, can you hear us?

20 THE WITNESS: Yes, I can.

21 THE COURT: Okay.

22 MR. SCHUVER: Ready, Judge?

23 THE COURT: Ready.

24 MR. SCHUVER: Okay.

25 CROSS-EXAMINATION

1 BY MR. SCHUVER:

2 Q. Good afternoon, Miss Deeter. I'm Mark Schuver.

3 We met at your first deposition in January of this year;
4 correct?

5 A. Yes.

6 Q. Okay. The name of the company you are employed by
7 you told us is William R. Deeter Associates Inc.; correct?

8 A. Yes.

9 Q. And it goes by the name, short name of Deeter?

10 A. Yes.

11 Q. And what Deeter is, it's an advertising and public
12 relations company; correct?

13 A. Yes.

14 Q. And for the last three, four, five years you have
15 had a total of six employees, including yourself and your
16 husband?

17 A. Right now we have six. It just varied. When the
18 economy was better, we had ten.

19 Q. Okay. And back in 2008 you had roughly about six
20 employees, give or take maybe one or two, fair enough?

21 A. That's right.

22 Q. Okay. And your title with the company is
23 executive vice president.

24 A. Yes.

25 Q. And as executive vice president you are

1 responsible for account management, production and
2 operations; correct?

3 A. Yes.

4 Q. And you told us that your degree is in the field
5 of education; correct?

6 A. That's right.

7 Q. You have no degrees or certifications as a graphic
8 designer, artist, anything like that?

9 A. No.

10 Q. And so you don't hold yourself out to be a graphic
11 designer; correct?

12 A. Correct.

13 Q. You are not the person on the computer doing the
14 computer drawings or doing the sketch or drawings by hand;
15 correct?

16 A. Correct.

17 Q. And your company, William R. Deeter Associates
18 Inc., they do not have any in-house designers; correct?

19 A. Correct.

20 Q. So anytime you need any graphic design work, you
21 go to an outside company and work with them; correct?

22 A. I would go to a graphic designer, not necessarily
23 a company.

24 Q. Okay. A graphic design company, that would be
25 correct, okay. Now you told us that Mark Swift was a

1 friend of your son Kirk; correct?

2 A. Yes.

3 Q. And Kirk is not an employee of, of your company
4 Deeter?

5 A. No.

6 Q. And you have never met Mark Swift; correct?

7 A. Correct.

8 Q. In fact, as far as communications with Mr. Swift,
9 you rarely communicated directly with Mr. Swift about any
10 of the work that you did on this project.

11 A. Correct.

12 Q. And you don't know Mr. Swift's wife, Ann Sickon,
13 S-I-C-K-O-N? Correct?

14 A. I -- correct.

15 Q. And you have never had any contact or
16 communication with Miss Sickon?

17 A. Correct.

18 Q. Now, you have never been in an employee of Mark
19 Swift's; correct?

20 A. Correct.

21 Q. And you have never been an employee of DeliverMed
22 Holdings LLC; correct?

23 A. Correct.

24 Q. You told us that in 2012 you had worked on a
25 project in creating brochures for a company called Express

1 Meds; correct?

2 A. Yes.

3 Q. Then in 2008 you told us that you were contacted
4 by a gentleman by the name of John Tollefson and then you
5 were doing work for a company named DeliverMed; correct?

6 A. Well, it was the same company, it was -- John
7 Tollefson was my contact continually.

8 Q. Continually. So throughout this project when you
9 are working on what's called the house and pestle and the
10 various advertisements and magnets that you put the house
11 and pestle logo on, you were primarily or almost
12 exclusively working with a gentleman by the name of John
13 Tollefson?

14 A. Primarily, yes.

15 Q. This project started some time or you first became
16 aware of the need to create this new or this brand and the
17 new logo for this company DeliverMed some time after
18 February 27, 2008; is that correct?

19 A. Yes.

20 Q. Prior to that, to your knowledge this company that
21 you were creating this brand and this logo for did not
22 have a logo in place prior to February of 2008.

23 A. I don't know.

24 Q. Do you recall -- you recall giving us your
25 deposition on January 16, 2012; correct?

1 A. I do.

2 Q. You probably have a copy of it there, Defendant's
3 Exhibit No. 193?

4 A. I have my deposition but I don't have Defendant's
5 Exhibit 193.

6 Q. Okay. But you have your a copy of your deposition
7 there; correct?

8 A. Not, not here in front of me, no.

9 Q. You don't. Well, let me read from your
10 deposition, page 36, beginning at line 24, and this is in
11 reference to when you were first brought in to work on
12 this project.

13 And you were asked this question. Question:
14 Always through John Tollefson, to your knowledge did
15 DeliverMed have a logo in place prior to you being asked
16 about this?

17 Answer: I don't know.

18 MR. McGURK: Your Honor, I thought that's the
19 identical answer she just gave.

20 THE COURT: I thought it was, too.

21 MR. McGURK: I don't understand how that can be
22 impeachment, Your Honor?

23 THE COURT: It's not impeachment. Move on.

24 Q. (BY MR. SCHUVER) Now, when you talked to Mr.
25 Tollefson, he told you he wanted a logo for a

1 pharmaceutical company that delivers prescriptions to your
2 home.

3 A. Yes.

4 Q. Then you told us you selected Allan Kovin to be
5 the graphic designer to draw these, the logos and do the
6 graphic work; correct?

7 A. I selected Allan Kovin to be the graphics
8 designer.

9 Q. Yes. And that's because you -- he had some
10 experience in pharmaceutical product, in dealing with
11 pharmaceutical products; correct?

12 A. He does.

13 Q. And Mr. Kovin works for or owns a company called
14 Kovin Design.

15 A. Yes.

16 Q. Allan Kovin has never been an employee of your
17 company, William R. Deeter Associates Inc.?

18 A. He has not.

19 Q. You have no written contractual agreement with Mr.
20 Kovin?

21 A. I do not.

22 Q. And you understood when you were dealing with Mr.
23 Kovin in 2008 that he does graphic design work for other
24 companies in addition to yours?

25 A. Yes.

1 Q. And when he did work for your company, he would
2 send you bills; correct?

3 A. Yes.

4 Q. And when you paid the invoices for his work you
5 would make the check payable in the name of Kovi n Design;
6 correct?

7 A. I think so.

8 Q. So after you selected Mr. Kovi n, you told us you
9 met with him and you gave him some parameters on what the
10 project involved; correct?

11 A. Yes.

12 Q. Let's talk about that. The parameters that you
13 gave to him were that this was a pharmaceutical delivery
14 company; correct?

15 A. Yes.

16 Q. And that you wanted a logo that was fresh,
17 current, up to date and professional; correct?

18 A. Yes.

19 Q. At no point in time did you, did you describe for
20 him anything about what specifically the logo should look
21 like or any specific details of the logo.

22 A. No, I did not.

23 Q. You always let the designer show you that.

24 A. I always select a designer who is highly capable
25 and I like to see a variety of designs come back.

1 Q. So you let the designer show you that?

2 A. Yes.

3 Q. You, yourself, did not sit down and put any idea
4 for a logo for DeliverMed in a tangible form?

5 A. I did not.

6 Q. You didn't draw a logo, whether it was on a
7 computer, a piece of paper or anything like that?

8 A. I did not.

9 Q. And the reason you didn't do that is because you
10 don't draw?

11 A. Correct.

12 Q. Now, Mr. Kovi n came up with various different
13 designs or concepts for this logo; is that correct?

14 A. Yes, it is.

15 Q. And you sent those various different designs to a
16 man by the name of John Tollefson; is that correct?

17 A. Yes.

18 Q. And you considered Mr. Tollefson to be the client;
19 correct?

20 A. No. Everything that I sent, I sent to John and
21 Mark Swi ft, always. And I considered Mark Swi ft to be my
22 client.

23 Q. Let's talk about the selection of the colors for
24 the logo. It's your testimony that you are the one who
25 selected the colors for the logo?

1 A. In collaboration. I believe in my deposition I
2 explained that we presented several different logos. This
3 is in Defendant's Exhibit 215. And the original
4 DeliverMed logo was not in the colors that it ended up in,
5 and I did, once we landed on the logo, we presented it in
6 a variety of shades of blues and greens and, yes, I did
7 recommend some to the one that was chosen.

8 Q. My question to you, Ms. Deeter, did you choose the
9 colors or did somebody else choose those particular
10 colors?

11 A. That's, that's hard to say. I would say, I, I
12 pretty much chose the colors with help from everyone. We
13 all agreed.

14 Q. You chose the colors, that's your testimony?

15 A. With help from others. So, so in collaboration
16 with others.

17 Q. Well, do you recall at page 201 of your deposition
18 beginning at line 6 testifying --

19 A. Would you like me --

20 Q. -- as follow --

21 A. Excuse me. Would you like me to go get the copy
22 of my deposition though I don't have it in front of me?

23 THE COURT: Is it handy?

24 THE WITNESS: Yes.

25 THE COURT: Go get it.

1 (Off the record.)

2 THE WITNESS: Okay, I have it.

3 Q. (BY MR. SCHUVER) Okay. If you would turn to page
4 201.

5 A. (Pause.) Okay.

6 Q. Beginning at line 6, question: And did you choose
7 the colors or did somebody else choose those particular
8 colors?

9 Answer: I chose the colors.

10 A. Right.

11 Q. Okay. So let's turn to Defendant's Exhibit 24.
12 Do you have that?

13 A. Yes.

14 Q. This is -- this is a series of e-mails, let's just
15 start off at the very top, it starts off, "Hi, John, this
16 may be helpful, it's from the actual designer to me."

17 That's an a e-mail from you to John Tollefson; is
18 that correct?

19 A. Yes.

20 Q. And the actual designer you are referring to is
21 Allan Kovin; correct?

22 A. Yes.

23 Q. And then below that we see an e-mail from you to
24 Mr. Kovin dated April 1, 2008 at 4:18 p.m. It starts kind
25 of in the middle of the page; is that correct?

1 A. Yes.

2 Q. And you tell Mr. Kavin that, quote, they like the
3 concept in the top left of the page with many
4 possibilities on it. This is the two rectangles with the
5 mortar and pestle.

6 "They" refers to who?

7 A. To John Tollefson and Mark Swift.

8 Q. So both of them together; correct?

9 A. Yes.

10 Q. And the various options you are talking about,
11 there were, it was a, Mr. Kavin had prepared a sheet,
12 Exhibit, Defendant's Exhibit 215. Let's refer to that.

13 A. All right.

14 Q. The last page, there are some thumbnails of
15 various logo designs that Mr. Kavin had created and
16 authored; correct?

17 A. Yes.

18 Q. And they were picking the one in the top left-hand
19 corner; correct?

20 A. That was the one they liked.

21 Q. And they, again, would be Mark Swift and John
22 Tollefson; correct?

23 A. Yes.

24 Q. Then you also state that they'd like to -- colors
25 to be more like the blue and green on the logo with the

1 black bar across the top. And again, the "they" is
2 referring to Mark Swift and John Tollefson; correct?

3 A. Yes.

4 Q. And they were referring to another logo up in the
5 upper right-hand corner of the last page of Defendant's
6 Exhibit 215, which had the colors that they wanted?

7 A. No, they were colors -- they were a blue and a
8 green. And if you read on in this, I got, and I directed
9 that they saw some options of blues and greens.

10 Q. And you directed Mr. Kovin to come up with those
11 options?

12 A. Yes, I did.

13 Q. Okay. So by April 1, 2008, the logo was locked in
14 or chosen; correct?

15 A. I believe so.

16 Q. And then the next step was to apply the logo to
17 letterhead, business cards, magnets and other materials;
18 correct?

19 A. Yes.

20 Q. So between April 1, 2008, and some time in August
21 of 2008 you are applying the logo to the letterheads, the
22 business cards, the magnets and other materials; correct?

23 A. Yes.

24 Q. Now, Ms. Deeter, this may sound like a stupid
25 question but clearly this logo was not in existence in

1 2006; correct?

2 A. As far as I know, it sure wasn't.

3 Q. And this logo was not in existence in 2007; is
4 that correct?

5 A. Correct.

6 Q. It didn't come into existence until Allan Kovi n
7 drew it some time in March of 2008; correct?

8 A. Correct.

9 Q. And any statement that this logo was in use or in
10 use in commerce in either 2006 or 2007 would be a false
11 statement; would that be correct?

12 A. Yes.

13 Q. The business cards, Allan Kovi n designed the
14 business cards with the house and pestle logo on it?

15 A. Yes.

16 Q. And John Tollefson is the one who told you exactly
17 how the business cards should read, he provided you the
18 language to put on them; correct?

19 A. Yes.

20 Q. So, do you have Defendant's Exhibit No. 21 there
21 in front of you?

22 A. Yes.

23 Q. This is one of the business cards that Mr. Kovi n
24 designed and authored?

25 A. He designed it. He didn't author it..

1 Q. Designed, okay. And we see the house and pestle
2 logo on it; correct?

3 A. Yes.

4 Q. And we see the name of Joe D. Siddler; correct?

5 A. Yes.

6 Q. And we see his job title, his address in
7 Washington Park, Illinois; correct?

8 A. Yes.

9 Q. And then we also see DeliverMed Holdings LLC;
10 correct?

11 A. Yes.

12 Q. And immediately below that the name Medicate
13 Pharmacy; correct?

14 A. Yes.

15 Q. And John Tollefson told you to put the Medicate
16 Pharmacy name on the business cards; correct?

17 A. He did.

18 Q. And that was all approved by Mark Swift; correct?

19 A. I don't know.

20 Q. You didn't object in any way to Medicate Pharmacy
21 being on the same card with the house and pestle logo; is
22 that correct?

23 A. I would not object.

24 Q. That's because you do what the client directs you
25 to do; correct?

1 A. Yes.

2 Q. And the client that directed you to do that in
3 this case was John Tollefson; correct?

4 A. Yes.

5 Q. And of course you anticipated that that business
6 card would be used; correct?

7 A. Yes.

8 Q. Okay. Let's look at a couple of others real
9 quick. You also applied this house and pestle logo to
10 some magnets, I guess kitchen magnets that you'd put on
11 your refrigerators or whatever; correct?

12 A. Yes.

13 Q. Okay. You can pull Defendant's Exhibits 4, 5 and
14 6.

15 A. Okay.

16 Q. We'll look at Defendant's Exhibit 4 very quickly.
17 It has the house and pestle logo; correct?

18 A. Yes, it does.

19 Q. And it says, "thank you for using Medicate
20 Pharmacy DeliverMed"; correct?

21 A. Yes.

22 Q. And the client told you to put that language,
23 Medicate Pharmacy DeliverMed, on the magnet; correct?

24 A. Yes.

25 Q. And at the bottom it says, quote, right at home,

1 close quote; correct?

2 A. There are no quotes.

3 Q. No quote, I was doing the quote but it just says
4 "right at home"?

5 A. It does.

6 Q. And again, the client told you to put that phrase
7 on the magnet also; correct?

8 A. Yes.

9 Q. In fact, your company Deeter did not do any of the
10 writing or copy for this magnet; correct?

11 A. Correct.

12 Q. It was all done as far as the writing and copy at
13 the direction of the client; correct?

14 A. Yes.

15 Q. Similarly, same thing with Defendant's Exhibit 5,
16 we see the house and pestle logo and "thank you for using
17 Medicate Pharmacy DeliverMed"; correct?

18 A. Yes.

19 Q. And again, that was all done at the request and
20 authorization of the client; correct?

21 A. Yes.

22 Q. Exhibit 6, do you have that?

23 A. I do.

24 Q. That says "Medicate Pharmacy offers right at home
25 pharmacy delivery service"; correct?

1 A. Yes.

2 Q. And at the very bottom it says, "proudly serving
3 Illinois for more than 23 years"; correct?

4 A. Yes.

5 Q. And do you know how long Medicate Pharmacy had
6 been in existence in 2008 when you were applying the house
7 and pestle logo to these magnets and using that phrase?

8 A. I do not.

9 Q. How about DeliverMed?

10 A. I do not.

11 Q. And all of that was put on the magnet at the
12 request and approval of the client; correct?

13 A. Yes.

14 Q. We'll turn to Defendant's Exhibit 33.

15 MR. SCHUVER: I think that's a new one, Judge.

16 A. Okay.

17 Q. (BY MR. SCHUVER) And these are a series of
18 e-mailed invoices from Kovin Design for the work performed
19 relating to this project; correct?

20 A. Yes.

21 Q. And in fact if you look at, there are some date
22 stamp numbers at the bottom right-hand corner that
23 identify each page. DET 02623, this is an e-mail from Mr.
24 Kovin to you dated April 17, 2008; correct?

25 A. Yes.

1 Q. And it is for developing the logo/mark for
2 DeliverMed, implementation of logo/mark to business
3 stationary set, card, letterhead, envelope; correct?

4 A. Yes.

5 Q. So what we see in Defendant's Exhibit 33, it
6 represents all the work that Allan Kovi n or Kovi n Design
7 did in creating these logos, magnets and everything else
8 that we have kind of gone through?

9 A. It covers what he states it covers in these, yes.

10 Q. And of course you paid that invoice, those
11 invoice; correct?

12 A. Yes.

13 Q. And when you made the payment, you made them out
14 to Kovi n Design?

15 A. Yes.

16 Q. Let's look at Defendant's Exhibit No. 3.

17 A. 3?

18 Q. Yes.

19 A. Okay.

20 MR. SCHUVER: And, Judge, this may also be the
21 Plaintiff's Exhibit and I don't remember which number. I
22 apologize.

23 Q. (BY MR. SCHUVER) This is a copy of your invoice
24 dated October 17, 2008; correct?

25 A. Yes.

1 Q. And it's addressed to Mr. Mark Swift, as you told
2 us; correct?

3 A. Yes.

4 Q. So, clearly assuming he got it in the mail, he
5 knew about the work that you were doing and all of the
6 items that were listed on here, the logo, the business
7 cards, the business cards with the union logo, the
8 magnets, everything else, when he received this invoice;
9 correct?

10 A. As far as I know, yes.

11 Q. Then Mr. Swift turned around and sent it to
12 Michael Schaltenbrand and asked him to pay for it. Is
13 that your understanding?

14 A. I don't know that.

15 Q. The invoice was paid; is that correct?

16 A. Yes, it was.

17 Q. And the payment was made by Medicate Pharmacy Inc;
18 is that correct?

19 A. That's what he told me at the deposition and what
20 is on the check, but I did not know that.

21 Q. That's what was on the check that you received for
22 payment; correct?

23 A. Yes.

24 Q. Okay. And the amount of the payment made by
25 Medicate Pharmacy Inc. was \$8,350; correct?

1 A. Yes.

2 Q. And that's the full amount of your invoice for the
3 work on this project; correct?

4 A. It's the amount of the invoice number, Exhibit
5 No. 3.

6 Q. Okay. Mark Swift never paid you a penny for this
7 logo.

8 A. I don't know that.

9 Q. Have you seen a check from Mr. Swift paying you a
10 penny for this logo?

11 A. I have not.

12 Q. DeliverMed Holdings LLC never paid you a penny for
13 this logo, is that correct, ma'am?

14 A. The check that we have was issued from Medicate
15 Pharmacy. I don't know where the money came from for the
16 check. I have no idea.

17 Q. Okay. So you send out this invoice to Mr. Swift
18 dated October 17, 2008. You receive the payment from
19 Medicate Pharmacy on March 6, 2009, a little less than
20 about five months later; is that correct?

21 A. Yes.

22 Q. Between October 17, 2008, and March 6, 2009, you
23 contacted John Tollefson by phone to ask him about the
24 payment; correct?

25 A. Was that in my deposition?

1 Q. I can read it to you if it will help refresh your
2 recollection. Does that sound correct?

3 A. Then I would say if that's what I said then, then
4 that's what it is.

5 Q. If you testified to that in your deposition,
6 Defendant's Exhibit 193 at pages 70 to 71, you would have
7 no reason to disagree with that; correct?

8 A. Okay.

9 Q. Okay. And Mr. Tollefson told you that you would
10 get paid; correct?

11 A. Yes.

12 Q. And of course we know that Medicate Pharmacy Inc.
13 paid for all that work; correct? Yes? You need to answer
14 out loud, Ms. Deeter.

15 A. That's what you're telling me.

16 Q. That's who you received the check from; correct?

17 A. Yes.

18 Q. All right.

19 A. Mm-hmm. Yes.

20 Q. Now, in addition to the phone call with Mr.

21 Tollefson, you also had a phone call with Michael

22 Schaltenbrand; correct?

23 A. Michael Schaltenbrand called me.

24 Q. Exactly. Michael Schaltenbrand called you at your
25 office; correct?

1 A. Yes.

2 Q. And he called you and indicated to you that he
3 owned the logo; correct?

4 A. I don't believe he indicated that he owned the
5 logo.

6 Q. Okay. He did not. He actually called you because
7 he wanted to talk about the bill from Deeter, your
8 company.

9 A. No.

10 Q. No. Do you recall, I think earlier you testified
11 that the date of this conversation was March of 2010?

12 A. I, I think that's what you testified.

13 Q. You initially testified in your deposition that
14 you thought it happened in the spring of 2011; correct?

15 A. I initially -- um -- it would be whenever I talked
16 with Jim McGurk for the first time.

17 Q. When did you talk to Jim McGurk the first time?

18 A. I think that was in March of 2011.

19 Q. 2011. So in your deposition you initially told us
20 it happened in 2011; correct?

21 A. Right.

22 Q. Then in your answers to interrogatories,
23 Interrogatory No. 12, you stated that it was in March of
24 2010; correct?

25 A. Yes. I think -- and then I think I went on to say

1 I thought I had made a mistake.

2 Q. The bottom line is, you can't remember exactly
3 when Mr. Schaltenbrand called you.

4 A. No, I can remember because it was when I first
5 talked to Mr. McGurk.

6 Q. Which would be in 2011?

7 A. Yes, I think so.

8 Q. Okay. You are familiar with Kathi, K-A-T-H-I,
9 Schrader, S-C-H-R-A-D-E-R?

10 A. Yes. She was a bookkeeper for us.

11 Q. She's no longer with you?

12 A. No, she hasn't been here for a few years.

13 Q. She was with your company in March of 2009; is
14 that correct?

15 A. Yes. I believe her name is on one of these
16 invoices.

17 Q. Okay. And she was a bookkeeper for your company;
18 correct?

19 A. Yes.

20 Q. And I'll show you -- do you have Defendant's
21 Exhibit 47 in front of you?

22 A. Yes.

23 Q. The first page of Defendant's Exhibit 47 is a fax
24 cover sheet with your company's name and information on
25 it; correct?

1 A. Yes.

2 Q. And that's your logo and the name Deeter; correct?

3 A. Yes.

4 Q. And this fax is dated March 6, 2009; correct?

5 A. Yes, it is.

6 Q. And it's from Kathi Schrader, bookkeeper for
7 Deeter; correct?

8 A. Yes.

9 Q. And written above her name and title she's written
10 a message, it says, quote, Mike, here are your outstanding
11 invoices, we would appreciate your help in getting them as
12 soon as possible, close quote. Did I read that correctly?

13 A. That's right.

14 Q. Now, Kathi Schrader, if the testimony from Mr.
15 Schaltenbrand is that he received this fax from Miss
16 Schrader shortly after speaking to you, does that help
17 refresh your recollection that your conversation with Mr.
18 Schaltenbrand actually occurred in March of 2009?

19 A. No. It definitely does not.

20 Q. Do you know why Kathi Schrader chose on March 6,
21 2009, to fax a copy of the Deeter invoice, which is the
22 second page of Defendant's Exhibit 47, to Mr.
23 Schaltenbrand?

24 A. I have no idea.

25 Q. You don't allow your bookkeeper to fax out

1 invoices for anyone other than the client, just if someone
2 calls and requests it, do you?

3 A. Excuse me?

4 Q. Was Kathi Schrader, was she free to fax out an
5 invoice to whoever may call to ask for one even if they
6 weren't the client?

7 A. Yes, she was.

8 Q. She was. Okay. You allow your bookkeeper to do
9 that.

10 A. Well, we're a small business and I didn't even
11 know that she had done this. She could have easily just
12 put Mike instead of Mark for all I know.

13 Q. You don't know how this is that this fax ended up
14 going to Mike Schaltenbrand on March 6, 2009?

15 A. I do not.

16 Q. So you have told us when you were doing this work
17 on the logo and the other various materials that you
18 usually worked with John Tollefson; correct?

19 A. Yes.

20 Q. And you simply assumed that Mr. Tollefson worked
21 for DeliverMed; correct?

22 A. That's correct.

23 Q. You considered Mr. Tollefson to be the client or a
24 representative of the client; correct?

25 A. I considered him to be a representative of the

1 client.

2 Q. And you knew that Mr. Tollefson was working with
3 Mark Swift; correct?

4 A. Yes.

5 Q. Ms. Deeter, neither you nor your company, William
6 R. Deeter Associates Inc., neither of you are licensed or
7 authorized to operate a pharmacy; is that correct?

8 A. We are not.

9 Q. And you and your company never used this house and
10 pestle logo for your own purposes; correct?

11 A. We did not.

12 Q. You never applied for a trademark on the logo;
13 correct?

14 A. Um -- we applied for the copyright that was
15 transferred.

16 Q. Do you understand the difference between a
17 trademark and a copyright?

18 A. Not legally, no.

19 Q. Okay. You were referring to what Mr. McGurk had
20 referred you to in your direct examination, the
21 certificate relating to the copyright in April of 2011;
22 direct?

23 A. Yes. The assignment for copyright, yes.

24 Q. Obviously your company, you and your company, did
25 not lose any profits because of any alleged use by others

1 or any infringement from use of this logo?

2 A. We did not.

3 MR. MCGURK: Your Honor, I guess an interpose an
4 objection in terms of legal conclusions but --

5 THE COURT: Overruled. She may answer. Well she
6 answered, we did not.

7 MR. SCHUVER: Is that okay, Judge?

8 THE COURT: That's fine.

9 Q. (BY MR. SCHUVER) So therefore you were not
10 seeking any financial damages in this litigation; correct?

11 A. Correct.

12 Q. And when I say "you" that means neither for you
13 personally or for your company William R. Deeter
14 Associates Inc.; correct?

15 A. Yes, correct.

16 Q. On the logo itself, the house and pestle logo,
17 there's nothing on that logo that would give anyone notice
18 that the logo had been copy written; correct?

19 A. Correct.

20 Q. You are familiar with the letter C in a circle
21 which puts people on notice of the existence of a
22 copyright?

23 A. Yes, I am.

24 Q. And there was no letter C in a circle put on this
25 logo?

1 A. No.

2 Q. And the words copyright or COPR were not put on
3 the logo?

4 A. Correct.

5 Q. Neither you nor your company ever provided
6 Medicate Pharmacy Inc. or Michael Schaltenbrand or Joe
7 Siddle with any notice that they were infringing on any
8 copyright; correct?

9 A. We did not.

10 Q. At no time did you or anyone from your company,
11 William R. Deeter Associates Inc. ever notify anyone that
12 the house and pestle logo should not be used in
13 conjunction with the Medicate Pharmacy name?

14 A. We did not.

15 Q. Ms. Deeter, let's talk about the copyright
16 certificate of registration. First of all, we know that
17 this logo came in existence some time in March or April of
18 2008. Is that a fair statement?

19 A. Yes.

20 Q. Then if we look at Plaintiff's Exhibit 38.

21 A. Okay.

22 Q. It indicates that you submitted an application for
23 a copyright on a house and pestle logo on April 1, 2011;
24 correct?

25 A. I believe --

1 MR. MCGURK: Your Honor --

2 THE COURT: Hold a second. Mr. McGurk?

3 MR. MCGURK: Yes, Your Honor. This is the
4 certificate of copyright for DeliverMed Holdings based
5 upon the assignment from Linda Deeter to DeliverMed
6 Holdings.

7 THE COURT: Doesn't say anything --

8 MR. MCGURK: This is not an application.

9 THE COURT: Nothing in here says that she applied
10 for anything.

11 MR. SCHUVER: That may be correct, Your Honor.
12 Apologize.

13 THE COURT: Okay.

14 Q. (BY MR. SCHUVER) During or prior to April of 2011
15 -- well in fact, strike that.

16 At no time have either you or your company ever
17 applied for a certificate of registration with the U.S.
18 copyright office for this logo; is that correct?

19 A. That's correct.

20 Q. Let's look at Plaintiff's Exhibit 38, and it says
21 that year of completion was 2008. And that's correct, is
22 that right? That this house and pestle logo was completed
23 in 2008?

24 A. Yes.

25 Q. And it says, date of first publication was June 1,

1 2008. Does that sound about right to you that that's when
2 you started implementing these things on the various items
3 that we have talked about?

4 A. Yes.

5 Q. Then it says, author, and it identifies you, Linda
6 Deeter; correct?

7 A. Yes, that's correct.

8 Q. And below that it says author created, and it says
9 you created the 2-D artwork; correct?

10 A. That's what it says.

11 Q. You didn't create the artwork here, Allan Kovi n
12 did; is that correct?

13 A. Allan Kovi n was the graphic designer and I was the
14 art director and he just did what I asked him to do.

15 Q. You didn't create the 2-D artwork, Allan Kovi n
16 did; correct?

17 A. Not exactly, no.

18 Q. You, yourself, did not sit down and put any idea
19 for this logo in a tangible form; correct?

20 A. I directed how it should be.

21 Q. I'm asking you, did you, yourself, sit down and
22 put any idea for this logo in a tangible form?

23 A. I did not.

24 Q. You didn't draw this logo, whether it was on a
25 computer, a piece of paper, or anything else like that?

1 A. I did not.

2 Q. And no one at your company William R. Deeter
3 Associates Inc. is a graphic designer; correct?

4 A. That's right.

5 Q. And no one at your company did that work, sat down
6 and drew on a computer or a piece of paper or anything
7 like that this logo?

8 A. That's right.

9 Q. On Plaintiff's Exhibit 38, next section below
10 identifies the copyright claimant and it states that the
11 copyright claimant is DeliverMed Holdings LLC; correct?

12 A. Yes, it does.

13 Q. And then below that it says, quote, transfer
14 statement by written agreement, close quote; correct?

15 A. Your quotes; right?

16 Q. My quotes, I'm sorry. Yes.

17 A. Yes. No, that's correct.

18 Q. So according to this document there was a transfer
19 statement by written agreement to DeliverMed Holdings LLC;
20 correct?

21 A. Yes.

22 Q. Now, we took your deposition, we started on
23 January 16, 2012. Do you recall that?

24 A. I do.

25 Q. And in advance of your deposition we served you

1 with a notice requesting that you produce various
2 documents including any documents relating to this logo,
3 any contracts, any assignments, any agreements; correct?

4 A. Yes.

5 Q. And you searched your files and you produced to us
6 what documents that you had; correct?

7 A. Yes.

8 Q. And on January 16 -- hold on a second. Let me
9 pull this out.

10 MR. McGURK: Your Honor, while counsel is
11 reviewing that, we're going to be having a call coming in
12 at 1:30.

13 THE COURT: No, we changed that to 2:00.

14 MR. McGURK: I see.

15 THE COURT: I told Marcia to call up there and
16 change it to 2:00.

17 MR. McGURK: Thank you, Your Honor.

18 THE COURT: What exhibit number is this now?

19 MR. SCHUVER: This is Defendant's Exhibit No. 9.

20 Q. (BY MR. SCHUVER) I'll show you what we have
21 marked as Defendant's Exhibit No. 9. Do you have that in
22 front of you?

23 A. Yes.

24 Q. And this document's entitled agreement for
25 assignment of copyright; correct?

1 A. Yes.

2 Q. And this is what you produced at the time of your
3 deposition in January of 2012; correct?

4 A. Yes.

5 Q. And this copy, Defendant's Exhibit No. 9, there's
6 no signatures on them; correct?

7 A. Correct.

8 Q. And we questioned you about that in your
9 deposition on January 16, if you had a copy with
10 signatures on it; correct?

11 A. I don't remember.

12 Q. Well, between January -- then we, we came back to
13 your deposition again on January 19, 2012; correct?

14 A. Yes.

15 Q. And in between we had asked you if you would
16 search for the signed copy; correct?

17 A. I believe you asked me to search for anything else
18 I might have.

19 Q. Including the signed copy of, of this document.

20 A. Is that in my deposition, that you asked for a
21 signed copy?

22 Q. I believe so. Since I wasn't prepared for this, I
23 can't cite to that. But in any event, you don't recall
24 what you -- do you recall one way or another at this time?

25 A. I do not. I don't remember being asked to produce

1 the signed copy of this.

2 Q. Okay. What we have marked as Defendant's Exhibit
3 No. 9, this is what you indicated in your deposition was
4 the copyright registration application agreement assigning
5 the copyright to DeliverMed Holdings LLC; is that correct?

6 A. Yes.

7 Q. You didn't testify that it was Plaintiff's Exhibit
8 44; is that correct?

9 A. Your question is, did I say this was -- I wouldn't
10 even know what Plaintiff's Exhibit 44 was.

11 Q. Well, you were shown Plaintiff's Exhibit 44
12 earlier by Mr. McGurk. That would be a signed document,
13 not the exact same thing as what we see as Defendant's
14 Exhibit No. 9; correct?

15 A. They are not exactly the same, no.

16 Q. Okay. In fact, they are different; is that
17 correct?

18 A. They are different because I signed the one and
19 Mr. Swift signed one, yes.

20 Q. There's also some other differences; is that
21 correct?

22 A. Well, I don't know what those are.

23 Q. Okay. But in any event when we took your
24 deposition in January of 2012, you identified Defendant's
25 Exhibit No. 9 as the document that you used to assign the

1 copyright to DeliverMed Holdings LLC; correct?

2 A. Yes.

3 Q. And at that point in time, that document was not
4 signed; is that correct?

5 A. The one that you showed me wasn't signed, but I
6 had signed one.

7 Q. Well, I showed you the one that you produced to us
8 in January of 2012; correct?

9 A. I don't remember what you showed me.

10 Q. Referring to your deposition at page 87, beginning
11 at line 20, I asked you the following question: If you
12 will look at DET 0129, that's a document titled agreement
13 for assignment of copy; correct?

14 Answer: Yes.

15 Question: And is this what you are indicating in
16 the copyright registration application was the written
17 agreement I guess assigning the copyright to DeliverMed
18 Holdings LLC?

19 Answer: Yes.

20 Is that correct?

21 A. Yes.

22 Q. So let's look at Defendant's Exhibit No. 9. It
23 starts off stating that Linda Deeter and Deeter
24 Associates, Deeter, and DeliverMed Holdings LLC,
25 DeliverMed, hereby agree that Deeter will assign a

1 copyright in the logo created by Linda -- created by Linda
2 Deeter and Deeter for DeliverMed of a house and pestle; is
3 that correct?

4 A. Yes.

5 Q. It says, will assign. This document does not
6 assign anything, it simply states that you will assign the
7 copyright if certain contingencies happen in the future;
8 correct?

9 A. Yes.

10 Q. Then if we look at the signed copy that we now
11 have, Defendant's Exhibit 44, it similarly starts off with
12 the same or similar sentence that you will assign a
13 copyright in the logo of a house and pestle created by
14 Linda Deeter and Deeter Associates; correct?

15 A. Yes.

16 Q. Again, it simply states that you will assign if
17 certain contingencies happened in the future; correct?
18 (Pause.) Is that correct, Ms. Deeter?

19 A. Well I'm looking, I'm trying to see what the
20 differences are. (Pause.) The Plaintiff's Exhibit 44 is
21 the one that I signed. Defendant's Exhibit No. 9 appears
22 to be the one that you discussed in my deposition.

23 Q. The one that you produced for us at the time of
24 your deposition; correct? Is that correct, Ms. Deeter?

25 A. Well, I'm not sure if I'm the one who produced it

1 or who produced it, but it appears that's definitely the
2 one.

3 MR. SCHUVER: I guess we have lost the video,
4 Judge?

5 THE COURT: Yes. We'll just have to continue.

6 MR. SCHUVER: That's fine.

7 Q. (BY MR. SCHUVER) Let's look at Defendant's
8 Exhibit No. 9, and we'll kind of point out if there is any
9 differences.

10 In Defendant's Exhibit No. 9, the document says
11 that you will be paid a total of \$10000 in two separate
12 installments; is that correct?

13 A. Yes.

14 Q. It says the first installment of \$5,000 will be
15 paid upon successful cancellation of the Schaltenbrand
16 copyright and the issuance of the Deeter copyright to
17 DeliverMed after registration with United States copyright
18 office; correct?

19 A. Yes.

20 Q. And that first installment has never been paid to
21 you; correct?

22 A. Correct.

23 Q. It then says, the second installment of \$5,000
24 will be paid on or before December 31, 2011, if the
25 copyright has been assigned by that date. If the

1 copyright has not been assigned by that date, the second
2 installment of \$5,000 will be paid on December 31 of the
3 year in which the assignment is completed. Is that
4 correct?

5 A. Yes.

6 Q. And that second installment has not been paid to
7 you; correct?

8 A. Correct.

9 Q. So, according to this document if the copyright
10 had been assigned to you, you would have received a
11 payment; correct?

12 A. Correct.

13 Q. You never received any money for this assignment
14 of the copyright; correct?

15 A. Correct.

16 Q. All right. If we looked at Plaintiff's Exhibit
17 44, it similarly says that you are going to receive a
18 total of \$10,000 in two installments; is that correct?

19 A. Yes.

20 Q. And you have received no payment for Plaintiff's
21 Exhibit No. 44; is that correct?

22 A. Yes.

23 Q. Now, \$10,000, that's a decent size amount of
24 money; correct?

25 A. Yes.

1 Q. That's more than the \$8,350 you charged for Mr.
2 Kavin and your staff to work on this project; correct?

3 A. Yes.

4 Q. And you have never charged as much as \$10,000 for
5 an assignment of a copyright before; is that correct?

6 A. Correct.

7 Q. Now, both Exhibit 9 and Exhibit 44 state that in
8 addition to agreeing to assign a copy some time in the
9 future, you'll also agree to do some other things for this
10 \$10,000; correct?

11 A. What was that?

12 Q. Well, for instance, one of the things that we see
13 both in Defendant's Exhibit No. 9 and Plaintiff's Exhibit
14 No. 44 is that for this \$10,000 you agree that you will
15 cooperate in litigation against Michael Schaltenbrand on,
16 on his copyright; correct?

17 A. Where is that?

18 Q. Oh, let's see, on Defendant's Exhibit No. 9, it is
19 the second sentence, I'll read it to you, Deeter and
20 DeliverMed agree that they will cooperate in litigation
21 against Michael Schaltenbrand for wrongfully obtaining a
22 copyright on the work which he has admitted he did not
23 create.

24 Did I read that correctly?

25 A. Yes.

1 Q. And similarly I think it's either identical or
2 very similar language, let me find it on Plaintiff's
3 Exhibit 44, it looks like it's also the second sentence,
4 it says, Deeter Associates -- well it's not clear, I don't
5 know if that's a period or a comma, Deeter, period, Deeter
6 and Associates, DeliverMed agree that they will cooperate
7 in litigation against Michael Schaltenbrand for wrongfully
8 obtaining a copyright on the work which he has admitted he
9 did not create; correct?

10 A. Yes.

11 Q. And of course both documents state that upon the
12 successful prosecution of the federal litigation finding
13 that the Schaltenbrand copyright on the Deeter design logo
14 is invalid, Deeter will be paid the money that we have
15 been talking about; correct?

16 A. Yes.

17 Q. So you are being paid for your participation in
18 this lawsuit; is that correct?

19 MR. MCGURK: Your Honor --

20 A. I guess --

21 THE COURT: Hold on, there's an objection.

22 MR. MCGURK: Yes, Your Honor, I guess I'll object
23 to the characterization, client being paid for her
24 testimony, I think this mischaracterizes --

25 THE COURT: Well, I don't think she's being paid

1 for her testimony but I'll allow the question.

2 Q. (BY MR. SCHUVER) Do you need the question
3 repeated to you, Miss Deeter?

4 A. No, I remember your question and, no, I have not
5 been paid.

6 Q. Well, I'm not asking you -- we know that you
7 haven't been paid, but you are being paid to participate
8 in this litigation, you will be paid if you are successful
9 against Mr. Schaltenbrand; correct?

10 A. Um -- I'm reading into what you are saying that
11 you are thinking I'm doing this because I'm going to get
12 paid. And that's not why I'm doing this at all.

13 Q. Well, Ms. Deeter, you had no intention of
14 participating in this lawsuit if you hadn't been promised
15 by Mr. Swift and his attorneys that you would be paid;
16 correct?

17 A. I was more interested in just having the right
18 thing happen.

19 Q. Defendant's Exhibit 9 and Plaintiff's Exhibit 44
20 both indicate that all attorney's fees and expenses for
21 you and your company will be paid by DeliverMed Holdings
22 LLC; correct?

23 A. That's right.

24 Q. You flew to St. Louis for your deposition in, in
25 January; is that correct?

1 A. Yes.

2 Q. Who paid for that flight?

3 A. Mr. Swift.

4 Q. And did you have any meals, hotel room, anything
5 like that when you were there?

6 A. No. No hotel room and no meal.

7 Q. Were you compensated for your time?

8 A. Yes, I was.

9 Q. Your regularly hourly rate is \$185 an hour when
10 you are doing work through your company; is that correct?

11 A. That's correct.

12 Q. How much were you paid to give your -- blah --
13 give your deposition testimony in January of 2012?

14 A. I don't recall and I don't have that in front of
15 me.

16 Q. Do you recall if it was based on an hourly rate?

17 A. Yes, it was.

18 Q. And was it a higher hourly rate than your \$185 an
19 hour?

20 A. No.

21 Q. It was not. Do you recall what the hourly rate
22 was?

23 A. I do not.

24 Q. Do you have any documents that you can refer to
25 that, that would tell us how much you were paid for your

1 deposition testimony?

2 A. We submitted an invoice for my time. And I don't
3 have that in front of me.

4 Q. I haven't received that invoice. Who is it you
5 submitted that invoice to?

6 A. To Mr. McGurk.

7 Q. Mr. McGurk. Okay. And when did you submit that
8 invoice to Mr. McGurk?

9 A. Some time after I was there.

10 Q. Some time shortly after your deposition in January
11 of 2012?

12 A. Yes.

13 Q. How about today? Are you also being paid for your
14 testimony here today, for your time?

15 A. I am not.

16 Q. Was it your understanding that the payments that
17 you received already for your time for testifying in the
18 deposition and for, and to reimburse you for your flight
19 to St. Louis, was that in addition to the promise of
20 \$10,000 in the future?

21 A. My flight to St. Louis was what was covered on the
22 invoice that I sent previously.

23 Q. And you also had your time put on that invoice,
24 too?

25 A. Yes.

1 Q. I guess what I'm asking, that's not coming out of
2 the \$10,000 that Mr. Swift and DeliverMed Holdings are
3 promising you when you do some time in the future assign
4 this copyright and are successful against Mr.
5 Schaltenbrand, that's in addition to that \$10,000? Or is
6 that, or do you have an understanding one way or the
7 other?

8 A. I don't have an understanding one way or the
9 other.

10 Q. Now, both Defendant's Exhibit 9 and Plaintiff's
11 Exhibit No. 44 state that you will assign a copyright in
12 the logo created by Linda Deeter and Deeter; is that
13 correct?

14 A. Yes.

15 Q. Then a little further down, at least on Exhibit 9,
16 and I haven't been able to cross-examine to Exhibit 44
17 yet, it states, Deeter will cooperate in the application
18 for a copyright on the house and pestle logo she designed;
19 is that correct?

20 A. Well, it's the company.

21 Q. Which company?

22 A. Deeter.

23 Q. Did Deeter design this logo or did Kovi n Design
24 design this logo?

25 A. Kovi n was the graphic designer. He was the

1 mechanic. I was the art director. It comes through our
2 company.

3 Q. You have no written contractual agreement with Mr.
4 Kovin; is that correct?

5 A. That's right.

6 Q. Allan Kovin has never been an employee of your
7 company William R. Deeter Associates Inc.; is that
8 correct?

9 A. That's right.

10 Q. So in Defendant's Exhibit No. 9 and Plaintiff's
11 Exhibit 44, we see references to you being the person who
12 designed, it says "she designed" on both of those
13 exhibits; correct?

14 A. What line is that?

15 Q. On the -- on Defendant's Exhibits?

16 A. Yeah.

17 Q. Defendant's Exhibit No. 9. It is about the middle
18 of the first paragraph, you'll see the sentence, copyright
19 on the house --

20 A. I see that.

21 Q. Do you see that?

22 A. I see that.

23 Q. Let me read it for the record just so it's clear.
24 Deeter will cooperate in the application for a copyright
25 in the house and pestle logo she designed; correct?

1 A. Yes.

2 Q. And then in Plaintiff's Exhibit 44, it says,
3 Deeter and Deeter Associates will cooperate in the
4 application for a copyright on the house and pestle logo
5 she designed; correct?

6 A. That's right.

7 Q. And Mr. McGurk is the one who provided you with
8 these agreements for assignment of copy, I think you have
9 already told us that; is that correct?

10 A. Yes.

11 Q. And you had a phone call with Mr. McGurk prior to
12 purportedly executing either one of these documents,
13 Defendant's Exhibit 9 or Plaintiff's Exhibit 44; correct?

14 MR. MCGURK: Your Honor, I guess I'm going to
15 object and move to strike any reference counsel makes to
16 purported signature. He's suggesting that the witness did
17 not sign it. Your Honor, I think that's improper and I
18 would ask that the Court strike that.

19 THE COURT: The Court's not going to strike it.

20 MR. SCHUVER: Thank you, Judge.

21 Q. (BY MR. SCHUVER) Do you need the question read
22 back to you, Ms. Deeter?

23 A. Yes, it was cut off.

24 MR. SCHUVER: Can I have the court reporter read
25 that back?

1 THE COURT: You don't remember it? I can try
2 again, Judge. Do you prefer that I do it that way?

3 THE REPORTER: I can read it.

4 THE COURT: Okay.

5 (The pending question was read back by the
6 reporter.)

7 THE WITNESS: It was -- I'm sorry, it was broken
8 up.

9 THE COURT: Now you can remember it.

10 MR. SCHUVER: Now I'll remember it, Judge. Thank
11 you.

12 Q. (BY MR. SCHUVER) Let me ask you this: You have
13 testified that you executed I guess at least Plaintiff's
14 Exhibit 44 on April 8, 2011; is that correct?

15 A. Yes.

16 Q. Okay. March 30, 2011, you had a phone call with
17 Mr. McGurk; is that correct?

18 A. I don't know the date.

19 Q. Let's see if we can refresh your recollection.
20 Your deposition, at page 120, I'm asking you about the
21 phone call with Mr. McGurk. And at line 18 the question
22 is: Okay. So you think that's the date, March 30, 2011?

23 And your answer is: Yes.

24 (Pause.)

25 A. Yes, because when we go above it --

1 Q. It's referring to that, to a letter that he sent
2 you on April 1?

3 A. Yes.

4 Q. And that refreshed your recollection when we
5 showed you the letter, that the phone conversation
6 happened on March 30; is that correct?

7 A. That's correct.

8 Q. And in fact the April 1, 2011, letter from Mr.
9 McGurk in fact referred to a phone conversation that you
10 had with him the prior day on March 30, 2011; correct?
11 (Pause.) That's okay, we'll move on. You agree that
12 having reviewed this --

13 A. One day --

14 Q. The letter referred to March 30, 2011.

15 A. Yes, it does.

16 Q. Okay. When you discussed your involvement over
17 the phone with Mr. McGurk about the logo on March, in
18 March of 2011, you informed him that Allan Kovic had been
19 involved with the design of the logo; is that correct?

20 A. Yes, from the very beginning I have stated that
21 Deeter worked for Mark Swift, and Allan Kovic was the
22 graphic designer on the project.

23 Q. And you told him that from the very beginning;
24 correct?

25 A. Yes.

1 Q. And in fact you made it clear to him that you do
2 not design; is that correct?

3 A. That's correct.

4 Q. You don't put pen to paper; direct?

5 A. Correct.

6 Q. And you made that clear to Mr. McGurk during this
7 March 30, 2011, phone conversation; correct?

8 A. I think so.

9 Q. Well, do you recall one way or another?

10 A. No, I don't recall.

11 Q. Okay. Let's see if we can refresh your
12 recollection. Page 132 of your deposition, in fact we'll
13 start at page 131 so we incorporate all of this.
14 Beginning on page 131, at line 19, question: So, when you
15 discussed your involvement with the logo on March 30,
16 2011, with Mr. McGurk, you did inform him that Allan Kovi n
17 had also been involved with the design of the logo?

18 Answer: Yes, I made it clear that I don't design.

19 Question: You made it clear to Mr. McGurk that
20 you don't design?

21 Answer: This is a fine line between how it
22 happens but I don't put the pen to paper.

23 Question: Okay. And you made that clear to Mr.
24 McGurk on this March 30, 2011, phone conversation?

25 Answer: I believe I did.

1 That was your testimony under oath back in January
2 of 2012; correct?

3 A. Yes.

4 Q. But nonetheless on April 8, 2011, after this phone
5 conversation with Mr. McGurk, he has you sign this
6 agreement for assignment of copyright that says that you
7 did design the logo; correct?

8 A. It says that our company designed the logo and it
9 uses me as the contact person at the company, yes.

10 Q. And you knew that Mr. McGurk was asking you to
11 join a lawsuit against Michael Schaltenbrand and Medicate
12 Pharmacy Inc. and Joey Siddle in which he was alleging
13 that you were the designer of this logo; correct?

14 A. I was asked to join in the proceedings, yes.

15 Q. Have you read any of the pleadings that were filed
16 on your behalf making allegations on your behalf in this
17 lawsuit?

18 A. Personally, no.

19 Q. You have never done that?

20 A. Not all of them.

21 Q. Okay. But at least as of March 30, 2012, you had,
22 number one, informed Mr. McGurk that Allan Kovin was the
23 one who designed the logo; correct?

24 A. Yes.

25 Q. And that, number two, you made it clear to him

1 that you do not design; correct?

2 A. Correct.

3 Q. Now, Defendant's Exhibit No. 9, there is a
4 paragraph near the bottom, and I think it's identical or
5 very similar on Plaintiff's Exhibit 44. Let me read you
6 the one in Defendant's Exhibit No. 9.

7 It says, Deeter and DeliverMed agree that the
8 trademark of the house and pestle logo by DeliverMed is
9 valid and was intended by the parties when the logo was
10 created.

11 That's on Defendant's Exhibit No. 9. Do you see
12 that?

13 A. Yes, I do.

14 Q. Then on Plaintiff's Exhibit No. 44, similar
15 language, a little different, it says, Deeter, Deeter
16 Associates and DeliverMed agree that the trademark of the
17 house and pestle logo by DeliverMed is valid and was
18 intended by the parties when the logo was created.

19 Did I read that correctly?

20 A. Yes.

21 Q. So those paragraphs that we see in Defendant's
22 Exhibit 9 and Plaintiff's Exhibit 44, they are referring
23 to a trademark; correct?

24 A. That's the word that they have, yes.

25 Q. And you signed Plaintiff's Exhibit 44; correct?

1 A. Yes.

2 Q. And it says that you agree that the trademark of
3 the house and pestle logo by DeliverMed is valid; correct?

4 A. Yes.

5 Q. But you don't know anything about the trademark of
6 the house and pestle logo by DeliverMed; correct?

7 A. That's correct.

8 Q. You never reviewed the trademark; correct?

9 A. I don't know that there is a trademark.

10 Q. You don't even know if there is one. You don't
11 know if, if any trademark that DeliverMed may have of the
12 house and pestle logo is even valid; correct?

13 A. That's right.

14 Q. The only reason you signed this document is
15 because Mr. McGurk told you to.

16 A. No, I signed the agreement because I worked with
17 Mark Swift and DeliverMed, and I didn't know who Michael
18 Schaltenbrand was. And it seems to me that this stated
19 that I worked with Mark Swift and DeliverMed.

20 Q. But you knew nothing about the trademark of the
21 house and pestle logo; correct?

22 A. That's right. I don't. I still don't know
23 anything about a trademark.

24 Q. And you didn't object to signing this agreement
25 for assignment of copyright even though it states that you

1 agree that the trademark of the house and pestle logo by
2 DeliverMed is valid; correct?

3 A. I followed my attorney's advice.

4 Q. You weren't involved in any way in developing the
5 name DeliverMed; is that correct?

6 A. No, I was not.

7 Q. Okay. You weren't involved in any process of
8 registering that name DeliverMed as part of any trademark
9 or anything like that; correct?

10 A. Yes.

11 Q. So on Defendant's Exhibit 9 and also on
12 Plaintiff's Exhibit 44, it says that you also agree that
13 the trademark of the house and pestle logo by DeliverMed
14 was intended by the parties when the logo was created. Is
15 that correct? (Pause.) Same paragraph we were referring
16 to earlier.

17 A. That's what it says.

18 Q. You never had any discussion with anyone at the
19 time this logo was created in March and April of 2008
20 about a trademark?

21 A. I did not.

22 Q. So, it would be fair to say that you didn't even
23 think about a trademark when this logo was created?

24 A. That would be fair.

25 Q. Let's look at Defendant's Exhibit 12.

1 MR. SCHUVER: That's a new one, Judge.

2 THE COURT: Got it.

3 A. Did you say Defendant's?

4 Q. (BY MR. SCHUVER) Yes, Defendant's Exhibit 12,
5 it's a large packet. Now -- oh, I'll wait for you to get
6 that. (Pause.)

7 THE COURT: Can you put the first page of that on
8 the screen?

9 MR. SCHUVER: Absolutely.

10 THE COURT: Just the first page, I know it's a
11 packet, but. Can you blow it up just a little bit?

12 MR. SCHUVER: Sure. Is there a section you want
13 to look at?

14 THE COURT: No, bring it down a little bit.

15 THE WITNESS: I don't think I have 12.

16 THE COURT: My eyes aren't as good as they used to
17 be.

18 MR. SCHUVER: I'm with you, Judge.

19 Q. (BY MR. SCHUVER) You don't think you have
20 Defendant's Exhibit 12? It consists of 20, maybe 30 pages
21 or so? It would be a fairly thick exhibit.

22 A. Right. (Pause.) I don't have it.

23 MR. SCHUVER: Jim, do you know? I mean, is it
24 something that --

25 Q. (BY MR. SCHUVER) Ms. Deeter, is this something

1 that you need to look for? I'm assuming it was sent to
2 you because it was part of the numbered exhibits that we
3 had identified that should have been given to you.

4 A. I have them all in numerical order and I, I'm not
5 in a consistent sequence. In other words, I don't go 1,
6 2, 3, 4, 5, 6 consistently. I'm missing different
7 numbers.

8 Q. Do you have anything that's a fairly large packet
9 of documents, like I said, about maybe 20, 30 pages thick?

10 A. I have two others like that.

11 Q. Why don't you pull those out? What I'm looking
12 for is one that the first page has a title DeliverMed
13 house logo copyright. And then below that it says,
14 neither Mike Schaltenbrand nor Medicate Pharmacy Inc. own
15 the copyright to the DeliverMed house logo.

16 A. I really don't have that.

17 MR. SCHUVER: Judge, I'm going to have to try to
18 do this and read portions. I don't know if she's going to
19 remember --

20 THE COURT: Try the best you can.

21 MR. SCHUVER: I'll try the best I can.

22 Q. (BY MR. SCHUVER) Ms. Deeter, do you recall that
23 Mr. McGurk provided you with basically a narrative,
24 several pages long, of various purported facts of the
25 case? And that you had produced that at the time of your

1 deposition in January of 2012?

2 A. Yes. Can I ask if I was supposed to also have 12
3 and 13?

4 Q. You were probably supposed to have 13, but that's
5 not critical. 13 is a small --

6 A. I don't have 11, 12 or 13.

7 Q. Well, you were supposed to have all three of
8 those, is all I can indicate to you. You don't have any
9 of those, is that correct, Ms. Deeter?

10 A. I don't. I don't have 11, 12 or 13.

11 MR. SCHUVER: Judge, I'll do my best.

12 THE COURT: Okay.

13 Q. (BY MR. SCHUVER) Ms. Deeter, in your deposition
14 you testified that you were provided with a group of
15 documents from Mr. McGurk that set forth a narrative of at
16 least purported facts in the case. Do you recall that?

17 A. Yes.

18 Q. Okay. And we had marked those as a group exhibit
19 in your deposition and you testified about those. And you
20 said you received that packet from Mr. McGurk just prior
21 to coming to your deposition in this case in January of
22 2012; is that correct?

23 A. Yes.

24 Q. And we'll refer to in Defendant's Exhibit 12 at
25 Bates stamp No. DET 013 4, and again I'm at a little bit

1 of a disadvantage because I can't refer you to it because
2 you don't have the exhibit. But I'll read to you what Mr.
3 McGurk wrote to you.

4 He stated, quote, on March 17, 2008, Linda Deeter
5 e-mailed to DeliverMed an attached page with several
6 samples of potential new logos including the house logo
7 under discussion here. See following pages for a copy of
8 an e-mail from Linda Deeter asserting this date and then a
9 copy of the page with the logo samples.

10 Do you recall that in your, in the packet or
11 testifying about that in your deposition?

12 A. Yes.

13 Q. Okay. Good. So Mr. McGurk indicated to you in
14 this packet he sent you right before I had come to take
15 your deposition that you had e-mailed these samples to
16 DeliverMed; is that correct?

17 A. John Tollefson and Mark Swift, yes.

18 Q. That's what I was going to ask you about. He
19 attaches to that, the next page is DET 0135. Let me get
20 it up on the screen. And I'm going to have to read it to
21 you again.

22 This is an e-mail from Linda Deeter to John
23 Tollefson with CCs to Bill Deeter, Drew Deeter, Jill
24 Eberts, Lucinda Lu, Shannon Jaeger, dated March 31, 2010
25 with attachments DeliverMed possibilities PDF.

1 Do you recall that?

2 A. Do I recall doing that?

3 Q. Yes.

4 A. Yes.

5 Q. So, when Mr. McGurk was saying you e-mailed it to
6 DeliverMed, you are referring to John Tollefson; is that
7 correct?

8 A. Yes.

9 Q. Referring back to DET 0134, again, I know you
10 don't have it in front of you, but Mr. McGurk states,
11 quote, the individual designer of the house logo was Allan
12 Kavin of Deeter, close quote.

13 Is that correct? Well, you don't have it in front
14 of you, but assuming I have read that correctly, do you
15 have any objection to that?

16 A. No, I don't.

17 Q. Okay. And so it is clear that Mr. McGurk knew
18 when he sent you this packet back in January of 2012 at
19 least that Mr. Allan Kavin was the designer of the logo;
20 correct?

21 A. He was the graphic designer on the project.

22 Q. And you already told us that on March 30, 2011,
23 you made it clear to Mr. McGurk that you did not design;
24 correct?

25 A. Yes.

1 Q. And I assume you also made it clear to Mr. McGurk
2 that Allan Kovi n has never been an employee of your
3 company; correct?

4 A. Correct.

5 Q. And that you have no written contractual agreement
6 with Mr. Kovi n; correct?

7 A. Yes. Correct.

8 Q. But in this exhibit, DET 0134, Mr. McGurk
9 nevertheless states that Allan Kovi n was, quote, of
10 Deeter, close quote; is that correct?

11 A. Well, he was of Deeter. He was a subcontractor to
12 us. He wasn't out there doing this on his own. He was
13 working for us.

14 Q. Do you recall in the packet that Mr. McGurk sent
15 you receiving an article from the United States copyright
16 office titled Copyright Basics?

17 A. Yes.

18 Q. And I know you don't is it in front of you, but
19 that article starts in Defendant's Exhibit 12 at DET 0112;
20 is that correct? Well, you don't know, but just for the
21 record.

22 At DET 0117, let me read to you a portion. This
23 is a portion of what Mr. McGurk sent to you from the same
24 article from the U.S. copyright office under the title
25 "transfer of copy."

1 It states, quote, any or all of the copyright
2 owner's exclusive rights or any subdivision of those
3 rights may be transferred, but the transfer of exclusive
4 rights is not valid unless that transfer is in writing and
5 signed by the owner of the rights conveyed or such owner's
6 duly authorized agent.

7 Do you recall receiving that article?

8 A. I do.

9 Q. Okay. Sir, do you know if Allan Kovi n ever
10 provided you with a written and signed transfer of his
11 rights in the house and pestle logo?

12 MR. McGURK: Your Honor, I guess I'm going to have
13 to object because of the fact that we have introduced that
14 transfer.

15 A. Allan Kovi n -- I kept Allan Kovi n out of this as
16 long as I could. And when --

17 THE COURT: Hold on a second. Hold on a second
18 Miss Deeter, there's an objection. And the Court's going
19 to overrule the objection and consider it for its weight
20 and not the admissibility of it in terms of whether there
21 was or was not an agreement to transfer.

22 MR. SCHUVER: I'm asking what her knowledge is.

23 THE COURT: What her knowledge is, yeah.

24 Q. (BY MR. SCHUVER) Would you like me to repeat the
25 question to you or do you recall it?

1 A. I would like you to repeat it, please.

2 Q. Okay. Let me ask you this: Are you aware whether
3 or not Mr. Kovin, Allan Kovin or Kovin Design, ever
4 prepared a written and signed document transferring any
5 rights in the house and pestle logo to anybody?

6 A. On Plaintiff's Exhibit No. 76 is the only document
7 I am aware of that Allan Kovin had signed. And this came
8 about after an attorney for Mr. Schaltenbrand contacted
9 Allan and offered to purchase the logo from him.

10 Q. And that --

11 A. At that point --

12 Q. I'm sorry, go ahead, didn't mean to cut you off.
13 Go ahead.

14 A. Well, that's Plaintiff's Exhibit No. 76, that is
15 one I know of, and 77, both of those.

16 Q. And that document of course is, that document of
17 course is dated March 20, 2012; is that correct?

18 A. That's right.

19 Q. And it's your understanding that this assigns
20 rights in the logo to you, Linda Deeter; correct?

21 A. Well, the one says that Allan and I are
22 transferring it to DeliverMed Holdings.

23 Q. At the time that you joined this lawsuit, you
24 obviously -- back in 2011, you did not have a written and
25 signed document from Mr. Kovin; is that correct?

1 A. That's right. I didn't. I didn't want to involve
2 him in this.

3 Q. The written and signed document that you have from
4 Mr. Kovin states that he received good and valuable
5 consideration for the assignment to you.

6 Did you pay Mr. Kovin anything on or after March
7 20, 2012, in consideration for the signing of that
8 document?

9 A. No, I did not.

10 Q. At any time, Ms. Deeter, did Mr. Schaltenbrand,
11 Mr. Siddler, or anyone from Medicate Pharmacy ever threaten
12 to pursue a claim against you or anyone else for use of
13 the house and pestle logo?

14 A. Would you repeat that, please?

15 Q. Sure. I'm asking you this, let me start with
16 Michael Schaltenbrand.

17 Did he ever tell you that he was going to pursue
18 any type of legal action, any type of a claim against you
19 or anyone else for any type of infringement or use of the
20 house and pestle logo?

21 A. Are you asking if I used the house and pestle
22 logo --

23 Q. I'm asking you if Mr. Schaltenbrand ever
24 threatened to file or pursue any type of action against
25 you in that regard.

1 A. No, not that I know of.

2 Q. Same thing with Joey Siddle. To your knowledge
3 he's never threatened or taken any action for any type of
4 infringement or use of the house and pestle logo?

5 A. I don't know Joey Siddle.

6 Q. And same question for Medicate Pharmacy. You're
7 unaware of them taking any such action?

8 A. Right.

9 MR. SCHUVER: I think that's all the questions I
10 have, Judge.

11 THE COURT: Mr. McGurk.

12 MR. MCGURK: Very brief, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. MCGURK:

15 Q. I try and avoid saying I'll be short. I'm
16 sensitive about that.

17 Mrs. Deeter, there has been some discussion about,
18 about payments to you here. When you received a telephone
19 call from Mr. Schaltenbrand, how much did he offer you for
20 your interests in the logo?

21 A. I don't believe I recall a specific amount of
22 money. I didn't know who he was and I was so taken aback
23 by getting a call from someone about a logo I had created
24 previously, our company had created previously that I
25 don't believe I even got to that conversation.

1 Q. Are you aware in this litigation that Mr.
2 Schaltenbrand has filed a counterclaim in this case
3 seeking to declare the logo created by Deeter as being
4 invalid?

5 MR. SCHUVER: Objection. She's already testified
6 she hasn't reviewed the pleadings.

7 THE COURT: Overruled.

8 A. No, I'm not aware.

9 Q. (BY MR. MCGURK) Who is Mr. Jeff Toner, T-O-N-E-R?

10 A. He is our corporate attorney here, the attorney
11 for our business.

12 Q. Did Mr. Jeff Toner have the opportunity of
13 reviewing the agreements that you have reviewed this
14 afternoon?

15 A. Yes, he did.

16 Q. And he made some changes to those?

17 A. I believe he did.

18 Q. On the issue of payments, you paid Kovi n Design
19 because that's what Mr. Allan Kovi n asked you to do; isn't
20 that correct?

21 A. Yes.

22 Q. In the same way that when you perform work you ask
23 payments be made to Deeter, the firm?

24 A. That's correct.

25 Q. Do you in fact intend that Mark Swift and

1 DeliverMed have the ownership of the logo in this case?

2 A. Absolutely.

3 MR. MCGURK: I have no further questions. Thank
4 you.

5 THE COURT: Any follow-up?

6 MR. SCHUVER: No, Judge.

7 THE COURT: I just have a couple curiosity
8 questions, I guess.

9 THE COURT: Where did, if -- first of all the
10 Court is going to deny the striking of Plaintiff's Exhibit
11 44, the substance of that exhibit, Plaintiff's Exhibit 44
12 and Defendant's Exhibit 9 is basically the same.
13 Defendants have had an opportunity to cross-examine Miss
14 Deeter on essentially the same document.

15 But I'm kind of curious why Plaintiff's Exhibit 44
16 just appeared just in the last few weeks and who it came
17 -- did it come from Mr. Toner and why wasn't it produced
18 -- I know, Mr. Cox, you said you received it from, from
19 Ms. Deeter's attorney. Was that Mr. Toner?

20 MR. COX: Mr. McGurk received it from Mr. Toner
21 and I forwarded it on. He gave it to me. If I can
22 explain, the reason -- what triggered this whole thing,
23 Judge, was they had just before that time, March 28th,
24 filed a motion in which they were claiming that they
25 didn't have a signed copy of it, in other words, with her

1 signature. I then contacted Mr. McGurk and asked him to
2 obtain that.

3 He contacted Ms. Deeter's attorney, who had a copy
4 of it, who sent it to us on March 28th, to Mr. McGurk. He
5 forwarded it to me. I marked it immediately and forwarded
6 it to the defendants. And that's how that came about. We
7 had the unsigned version but we, that caused me to want to
8 get, or to find the signed version, follow-up with it, and
9 I did that and got it and sent it on.

10 THE COURT: And I assume that unsigned version
11 was, was tweaked by Mr. Toner? Because there is -- there
12 are some differences here. Who --

13 MR. COX: Apparently so.

14 THE COURT: Who --

15 MR. COX: Apparently so.

16 THE COURT: Who made changes?

17 MR. COX: That, I can't say. I wasn't involved in
18 it.

19 THE COURT: Well, Mr. McGurk, maybe you can shed
20 light on it.

21 MR. MCGURK: Yes, Your Honor. For the record,
22 that draft was provided to Ms. -- Mrs. Deeter and to her
23 counsel and there were some suggestions, revisions made by
24 Mr. -- by counsel for Ms. Deeter. And those revisions
25 were included in the final draft for signature for all

1 parties.

2 THE COURT: But at the time of her deposition the
3 signed version was, was nowhere to be found?

4 MR. MCGURK: That was the problem, we were going
5 through the records, my records, as well as DeliverMed's
6 records and we were unable to locate that until we were
7 able to get it from Mr. Toner.

8 THE COURT: But I said that the essential
9 substance of the documents are the same and so the Court's
10 going to deny defendant's motion to strike.

11 MR. MCGURK: Thank you, Your Honor.

12 THE COURT: 44 will be admitted.

13 Okay. Thank you, Miss Deeter. And I guess you
14 could almost go to dinner now. We have gone through
15 lunch, you can almost go to dinner. So you are, you are
16 excused.

17 THE WITNESS: Thank you.

18 MR. SCHUVER: Judge, housekeeping on admitting --

19 THE COURT: And that can be done. I think we have
20 a call coming in in 10 minutes from Chicago.

21 MR. SCHUVER: Thank you, Your Honor.

22 THE COURT: Okay.

23 (Court recessed from 2:20 p.m. to 2:32 p.m.)

24 THE COURT: Okay, you can admit exhibits, Mr.
25 Schuver.

1 MR. SCHUVER: Defendant's Exhibits 3. Do you want
2 them individually or --

3 THE COURT: Just jointly.

4 MR. SCHUVER: 3, 9, 12, 21, 33 and 47. I think
5 that was all.

6 THE COURT: Any objection?

7 MR. MCGURK: No objection.

8 THE COURT: They'll be admitted.

9 (Off the record.)

10 THE COURT: Go ahead and swear the witness in.

11 (Witness sworn by clerk.).

12 THE WITNESS: Craig L. Greene, G-R-E-E-N-E.

13 CRAIG L. GREENE,

14 having been first duly sworn, was examined and testifies
15 as follows:

16 DIRECT EXAMINATION

17 BY MR. MCGURK:

18 Q. Mr. Greene, can you tell us the name of your firm?

19 A. (Pause.)

20 (Off the record, video conference technical
21 issues.)

22 Q. Mr. Greene, can you please tell us the name of
23 your firm?

24 (Off the record.)

25 VIDEO TECHNICIAN: The only other option is to do

1 this by phone.

2 THE CLERK: And we could do that.

3 THE COURT: I understand.

4 VIDEO TECHNICIAN: The only other option if it
5 keeps dropping is to do this by phone conference.

6 THE COURT: I understand.

7 Q. (BY MR. MCGURK) Mr. Green, what is the name of
8 your firm?

9 A. McGovern and Greene LLP.

10 Q. Mr. Greene, what is your occupation?

11 (Off the record, video conference technical
12 issues.)

13 THE COURT: Well, we have a couple options, we can
14 either do this by telephone or wait until he comes down
15 here later this week or first of next week and have him
16 testify in person. Those are the two options.

17 MR. COX: Is there a -- just a minute. Is there a
18 place in Chicago where he could go and do the same thing
19 and not do it through the court there, by an outside
20 service of some kind?

21 THE COURT: That I do not know.

22 (Off the record.)

23 MR. COX: That might be an alternative for him to
24 come and set it up that morning, it's an idea.

25 MR. STINE: I'm fine.

1 THE COURT: Okay, we're back.

2 MR. McGURK: Shall we try and soldier on?

3 Q. (BY MR. McGURK) Mr. Greene, what is your
4 occupation?

5 A. I'm a Certified Public Accountant, forensic
6 accountant with McGovern and Greene.

7 Q. What do you mean by the term forensic accountant?

8 A. What I mean by that term is that we provide
9 accounting services to a wide variety of clientele,
10 attorneys, corporations and the like, in matters where
11 there's potentially some litigation that may or may not be
12 filed and we do analysis to help the attorney in those
13 sorts of cases or the client.

14 Q. Can you very briefly describe your educational
15 background?

16 A. Yes, I possess a Bachelor's Degree in Accounting
17 from Aurora University. I graduated in 1976. I have a
18 Master's Degree in Criminal Justice from Boston University
19 in 2007.

20 THE COURT: Is there a CV?

21 MR. McGURK: Yes, Your Honor, attached as Exhibit
22 1 to Plaintiff's Exhibit 3 is Mr. Greene's CV.

23 THE COURT: Okay. Just, you know, that will
24 stand. You don't have to go through everything. I can
25 look at the CV and see his qualifications.

1 MR. McGURK: Very well, Your Honor.

2 Q. (BY MR. McGURK) And Mr. Greene, just -- and this
3 is one brief point.

4 A. That's fine.

5 Q. Have you ever acted as an instructor for any
6 federal law enforcement agencies?

7 A. Yes, I have.

8 Q. For whom?

9 A. Yes, I teach contract and procurement fraud for
10 the Naval Criminal Investigative Services at the Federal
11 Law Enforcement Training Center in Glynco, Georgia.

12 Q. In terms of basic accounting, which we may touch
13 on, have you ever been an accounting instructor?

14 A. Yes, I have. I taught principles of accounting at
15 Aurora University in 1977, I believe.

16 Q. And are you being compensated for your work as an
17 expert witness in this case?

18 A. Yes, I am.

19 Q. First of all, I'm going to ask you if you have a
20 copy of what's been previously marked as Plaintiff's
21 Exhibit 3, which is the expert report of Craig L. Greene.
22 Do you have a copy of that?

23 A. Yes, I do. Yes, I do.

24 Q. All right. I'm going to ask everyone to turn to
25 page 11 of 11, our first order of business. And at the

1 bottom, what is the date beside your signature?

2 A. The date reads January 10th, 2011.

3 Q. And what should the date read?

4 A. The date should read January 10th, 2012. That was
5 a typo that I made.

6 Q. I'll correct that on its face.

7 In addition, did your firm McGovern Greene prepare
8 two other reports in this case?

9 A. Yes, our firm did.

10 Q. This will be very brief, but I'm going to ask you
11 if you have a copy of Plaintiff's Exhibit 1, which is the
12 report of findings of McGovern Greene dated May 17th,
13 2010.

14 A. Yes, I do.

15 Q. Was this prepared by your firm and under your
16 supervision?

17 A. Yes, it was.

18 Q. And then referring to Plaintiff's Exhibit 2, the
19 stock valuation report dated June 7th, 2010, I ask if this
20 was prepared under your supervision?

21 A. Yes, it was.

22 Q. Are you, is the report, Plaintiff's Exhibit 3, the
23 most current work that you have done on this matter?

24 A. Is that the report that's dated the June 10th,
25 2012, sir?

1 Q. I'm sorry, the January -- Plaintiff's Exhibit 3,
2 the one dated January 10, 2012, that's correct.

3 A. Correct, yes, sir, that's the most recent report
4 that I have prepared.

5 MR. MCGURK: Most of our, the testimony will be
6 relating to Plaintiff's Exhibit 3, the 2012 report, but
7 there are certain aspects that may be referred to in the
8 prior exhibit.

9 THE COURT: Okay.

10 MR. MCGURK: So for simplicity sake I would simply
11 move to admit everything and then we can go through the
12 individual ones.

13 THE COURT: Any objections?

14 MR. STINE: Judge, I do have an -- I mean, I don't
15 know what kind of foundation he plans to lay for 1 and 2.
16 If 3 is their report, I just want -- if he's just going to
17 be referring to exhibits in 1 and 2, I don't have a
18 problem with that. But I mean, I think they have to lay
19 some foundation for this report before it's admitted.

20 THE COURT: I assume he'll be doing that as he
21 goes along, and the Court's going to admit it and it will
22 go to the weight and not the admissibility.

23 MR. MCGURK: Thank you, Your Honor.

24 Q. (BY MR. MCGURK) Now, Mr. Greene, what was your
25 assignment in this matter?

1 A. My assignment in this matter was to review various
2 financial documents of the relationship between Medi cal d
3 pharmacy -- Medicate Pharmacy, rather, and DeliverMed. I
4 examined various tax returns. And in so examining them, I
5 determine what unpaid commissions were due to Mark Swift.
6 I also examined wages and determined the amount of unpaid
7 wages that were due to Mr. Swift. I looked at the
8 distributions that were taken by Mr. Schaltenbrand and
9 determined what the distributions should have been to Mr.
10 Swift. I also ascertained an amount that was due for some
11 excess box filling charges that were due to Mr. Swift.
12 And finally, using the methodology of Medicate Pharmacy's
13 accountants, I computed a value, a range of values for Mr.
14 Swift's interest in that company.

15 Q. And turning to page 5 of 11 of Plaintiff's Exhibit
16 3, which is the January 2012 expert report, does the
17 summary of opinions reflect the amounts that you, that you
18 have derived from your review?

19 A. Yes, it does.

20 Q. Referring to the Exhibit 3 of this, which is the
21 very, at the very end of the Exhibit 3, that is, say
22 Exhibit 3 say of Plaintiff's Exhibit 3, can you tell us
23 what that is a listing of?

24 A. These are a listing of the various documents that
25 I considered and relied upon in forming my opinions in my

1 expert report.

2 Q. Referring to paragraph or point 10, what is the
3 most current general ledger that you reviewed for the
4 Medicate Pharmacy Washington Park entity?

5 A. It was dated November 30th, 2011.

6 Q. So all of the activity from November 30th, 2011,
7 to the present is not reflected in your report?

8 A. That is correct.

9 Q. Now --

10 A. Just to clarify that point, in determining the
11 amount of wages that were due to Mr. Swift, I did consider
12 through the period of February 2012.

13 Q. We will reach that point after we deal with point
14 one, which is unpaid shared profits. And I'm going to ask
15 you to turn to page 7 of 11 of the January 2012 expert
16 report, Plaintiff's Exhibit 3, and ask if you can tell us
17 based upon this section how you determined the unpaid
18 shared profits for the time period listed?

19 A. Sure. It was -- Mr. -- Miss Sickon and Mr. Swift
20 were to receive 40 percent of the profits that were made
21 on the mail order sales business of Medicate Pharmacy.
22 And during discovery in this case, it was disclosed that
23 there were other financial statements that I had
24 previously not seen that showed the profits for that
25 particular enterprise under Medicate DeliverMed. And what

1 I have done here is put together a table that lists the
2 years 2005 through 2007, and I reflect the net income that
3 is shown on the financial statements that were prepared by
4 the company's accountants Schaltenbrand and Schaltenbrand,
5 and I have cited here the various references to those
6 documents. And I take that amount of net income and then
7 I multiply it by the portion that was due to either Sickon
8 or Swift in the amount of 40 percent.

9 So, for example, in the first row, I show the
10 profits as shown in the financial statements of \$404,000.
11 I multiply that by 40 percent, which results in the
12 computation of \$161,635. From that, I deducted the amount
13 as of payments that were given to Sickon and Swift, and
14 the remaining amount due, the 145,933, is what I have
15 computed for the year 2005.

16 Likewise, I made that same computation for the
17 years of 2006 and 2007, where I show the profits as
18 determined by the outside accountants, multiply it by 40
19 percent, subtract the payments that were made to Swift and
20 Sickon, and determine the remaining amount that's due.

21 There was a payment in 2009, a lump sum payment of
22 129,000 which I also reduced the amount due the two of
23 them in determining the unpaid share of profits at
24 \$860,647.

25 Q. And the references in brackets, PP-927, for

1 example, what does that refer to?

2 A. These are documents that have been produced in the
3 case, the Bates stamp number. I believe the PP stands for
4 previously produced.

5 Q. Now, referring to 2009, was that 129,000 actually
6 two lump -- payments of 60,000 and then 69,000?

7 A. Yes, sir, it was. It was two payments.

8 Q. Now, turning to the unpaid salary component
9 starting at the bottom of page 7 and then continuing over
10 to page 8 of 11, can you tell us how you computed that
11 figure.

12 A. Certainly. As I point out in my report, in
13 mid-2008 Mark Swift was reviewing the financial records
14 that again were maintained by Schaltenbrand and
15 Schaltenbrand for the pharmacy and determined that Mr.
16 Schaltenbrand was in fact receiving a
17 thousand-dollar-a-week payment for a salary. He
18 approached Mr. Schaltenbrand about that. And when
19 confronted with the fact, Mr. Schaltenbrand agreed to pay
20 Mark Swift \$151,000. The agreement was to be over a
21 12-month period of time and the amount of \$12,583 per
22 month.

23 In examining the accounting records, we determined
24 8 of the 12 payments were made through August of 2009 and
25 the remaining four payments were not.

1 Excuse me, I have a little bit of a head cold
2 coming on.

3 So as a result, \$50,333 representing the portion
4 from September 2009 through December 2009 was not made.

5 And that is what I show up on my first number
6 there, the 50,333 represents what's still unpaid for the
7 years 2005 through 2007.

8 After Mr. Schaltenbrand terminated Mr. Swift, he
9 did not pay him the remaining amounts due for 2009, which
10 is computed at 15 weeks for a total of \$15,000.

11 I have also computed the years 2010 and 2011 as
12 simply the number of weeks in the year, 52, times the
13 thousand, is \$52,000.

14 Q. And for --

15 A. And for 2012, through the date of my report, seven
16 weeks had passed so that amount was \$7,000.

17 So when you sum these numbers up, you arrive at a
18 total amount of unpaid salaries of \$176,333.

19 Q. At the time of your report was the scheduled trial
20 date in this matter February 21st? And is that why you
21 used that date?

22 A. That is correct, sir.

23 Q. So we would simply take from the beginning of the
24 year to today's date, times a thousand to calculate what
25 the figure would be for 2012; is that correct?

1 A. That, that is correct. I calculated additional 10
2 weeks since that date til today.

3 Q. Additional 10 weeks at \$10,000 [sic] a week --
4 \$10,000?

5 A. At a thousand dollars a week or \$10,000, correct.

6 Q. Now, Mr. Swift and Mr. Schaltenbrand had the
7 agreement that since Mr. Schaltenbrand was receiving a
8 thousand dollars a week from the mail order operation, Mr.
9 Swift was to be receiving that amount. And in fact he did
10 receive that during 2008 and all the way through the date
11 of his, his termination. Do you understand that?

12 A. Yes, I do.

13 Q. Well, if Mr. Schaltenbrand increased his salary
14 from a thousand dollars a week to a substantially higher
15 salary, would that agreement mean that Mr. Swift should
16 not be receiving merely a thousand dollars a week but the
17 higher salary?

18 MR. STINE: Your Honor, I'm going to object, I
19 haven't been saying much up until now --

20 THE COURT: I'm going to sustain that.

21 Q. (BY MR. MCGURK) Let's turn to unpaid distribution
22 starting on page eight at the bottom.

23 First of all, what, can you briefly describe what
24 a sub S corporation, or what I guess today is referred to
25 as an S corporation, what is that?

1 A. Yes. An S corporation is originally formed as a
2 tax entity to be used by small businesses to alleviate the
3 burden of double taxation. Under the internal revenue
4 code, corporations pay a tax on their corporate earnings.
5 And when they pay their shareholders, they distribute
6 those funds typically as dividends and those are taxed as
7 well at the individual's tax rate. In order to relieve
8 this extra burden on small businesses, some years ago a
9 new entity or a new tax entity, if you will, was formed
10 called a subchapter S corporation, wherein if you were a
11 small business and you met the requirements of that, you
12 know, of a small business corporation, your shareholders
13 at that time I think was less than 25 or 30 shareholders,
14 and your revenues were below a certain amount, you could
15 elect under the internal revenue code to be treated as
16 this subchapter S corporation.

17 And instead of the profits being taxed at a
18 corporate tax rate, rather the profits of the company were
19 distributed to the owners of the company based upon their
20 pro rata share of ownership, and the individuals would
21 report that amount of income or loss on their personal tax
22 returns. So it would eliminate this double taxation.

23 Q. Now, in the circumstance of the case here, did you
24 understand that there was an agreement between Mr. Swift
25 and Mr. Schaltenbrand concerning distributions of profit

1 from the endeavor?

2 A. It was my understanding that Mr. Swift had a
3 percentage ownership of the endeavor and that therefore
4 would participate in those profits.

5 Q. Can you explain your calculations on page 9 of 11
6 in terms of the distributions to Mr. Schaltenbrand, what
7 is the source of that information?

8 A. Certainly. The distributions shown to Mr.
9 Schaltenbrand, those figures come directly off of the tax
10 returns that were filed for Medicate with the Internal
11 Revenue Service for the tax years ended December 31, 2008,
12 2009, and 2010. The amount of distributions shown as of
13 November 2011, that amount comes from the financial
14 statements prepared by Schaltenbrand and Schaltenbrand for
15 the Medicate Pharmacy.

16 So these amounts here represent payments from the
17 companies made directly to Mr. Schaltenbrand as a
18 distribution of the, it appears the profits of that
19 subchapter S corporation, to him.

20 Q. And again, the end date here is November 30, 2011,
21 and does, therefore does not reflect any distributions to
22 Mr. Schaltenbrand from that date to the present date; is
23 that correct?

24 A. That is correct.

25 Q. Now, how is it you calculate the pro rata

1 distributions due to Mr. Swift?

2 A. Under the internal revenue code, as a subchapter S
3 corporation, when distributions are made the distributions
4 must be made to all shareholders. And those distributions
5 have to be paid based upon the percentage ownership in the
6 company.

7 In this particular case, Mr. Schaltenbrand had
8 showed a 52 and a half percent interest in the company.
9 So what I did was, it was my understanding that Mr.
10 Swift's interest was 37 and a half percent, based on some
11 e-mail correspondence that I had reviewed. So what I did
12 was I simply took the 37 and a half percent which
13 represented Mr. Swift's ownership, divided it by the 52.5
14 percent amount which represented Mr. Schaltenbrand's
15 ownership, and determined that for every dollar that Mr.
16 Schaltenbrand took out, then under the internal revenue
17 code Mr. Swift should have also been distributed in this
18 case 71.43 cents, or 71.43 percent of what Mr.
19 Schaltenbrand has taken.

20 So, for example, in 2008 I have taken 71.43
21 percent of the 935,399 of Mr. Schaltenbrand to determine
22 what the pro rata distribution to Mr. Swift should have
23 been, which is shown as a \$668,142.

24 Q. Did that pro rata distribution calculation change
25 or did you change the amount for years after 2008?

1 A. Yes, I did.

2 Q. How is it you choose that?

3 A. For years after 2008, it's my understanding that
4 Mr. Swift's ownership percentage was reduced from 37 and a
5 half to 35 percent, and that Mr. Schaltenbrand's ownership
6 was reduced from 52.5 percent to 51. So following the
7 same formula, I simply took Mr. Swift's percentage of 35
8 percent, divided it by 51 percent, to arrive at 68.63
9 percent. So in this particular instance, for every dollar
10 that Mr. Schaltenbrand was paid under the internal revenue
11 code, Mr. Swift should have received 68.63 cents, or, so
12 68.63 percent of what Mr. Schaltenbrand took. And that is
13 the figures that I applied for the years 2009 and
14 subsequent.

15 Q. Mr. Greene, the distributions that are reflected
16 on page 9 of 11 to Mr. Schaltenbrand are taken from the
17 tax returns; is that correct?

18 A. Yes. Those -- well, for the years 2008 through
19 2010, those come directly from the tax returns that I was
20 given for Medicate Pharmacy. For the year 2000 --
21 November 2011, it came from their accounting records.

22 Q. Well, I want you to assume for purposes of my
23 question that, that some error had been made and in fact
24 the Medicate Pharmacy was not as profitable as, as the
25 financial statements reflected originally and therefore it

1 was less profitable. Would that change your opinion as to
2 the amount owed to Mr. Swift?

3 A. No, it would not.

4 Q. Why?

5 A. There's a difference here. These represent actual
6 distributions or amounts of money that were paid from the
7 company directly to Mr. Schaltenbrand. So those payments
8 have been made and those have been classified as
9 distribution.

10 And again, under the internal revenue code, if one
11 shareholder takes distributions then the other
12 shareholders must receive the same amount of distributions
13 or must receive distributions based upon their pro rata
14 percentage of ownership.

15 So whether or not it was more profitable or less
16 profitable would not impact that because the distributions
17 had already been paid out in these amounts.

18 Q. Turning to the bottom of page 9 of 11,
19 reimbursement for excess box filling charges, can you
20 explain what that entry refers to?

21 A. I reviewed an a e-mail that was prepared by Mr.
22 Siddle. And Mr. Siddle was the, I believe the operations
23 manager for Medicate Pharmacies. And what he discovered
24 was that there was a error in the amount of box charges
25 that were applied to diabetic supplies. It should have

1 been charged in the amount of \$15, in fact it had been
2 charged at the amount of \$20 for this period of August
3 2005 through July 2008.

4 Mr. Siddle computed the amount of overcharges and
5 the amount of allocation of those overcharges to both
6 himself and Mr. Swift. The amount that he computed for
7 Mr. Swift was \$30,132. And that is the figure which is
8 shown on the bottom of page 9.

9 Q. Now let's turn to page 10 of 11, business
10 valuation. First of all, how did you compute the figures
11 on page 10 of 11 of your report of January 2010.

12 A. What I did in this particular computation was, I
13 used the methodology that had previously been used by
14 Medicate's accountants Schaltenbrand and Schaltenbrand
15 where they multiply profits by a weighted average factor
16 to determine value. So what I have done is basically use
17 their formula and inserted into the formula numbers for
18 net profit for the years 2005, 2006 and 2007 that were
19 shown in the financial statements that we subsequently got
20 that were previously undisclosed and discussed in the
21 beginning of my testimony with regards to commissions. I
22 put those net profits in there. And then using their
23 methodology, multiplied those profits by these three
24 factors, 1, 2 and 3, to determine what a weighted average
25 amount would be.

1 And when we as accountants do weighted average, we
2 multiply it -- we give more weight to the more recent
3 years, and that's why the year 2007 is multiplied by 3.

4 So you determine a subtotal figure which is shown
5 there at the 8,080,436. We then divide that number by 6,
6 which is the sum of the factors that were used, the 1, the
7 2, and the 3, and that gives me a weighted average income
8 for those three years of 1,346,739.

9 I multiplied that figure by the number of 7, which
10 again is the methodology that was used by Schaltenbrand
11 and Schaltenbrand, to come up with a total value of
12 \$9,427,175. So that's just simply multiplying the
13 weighted average by what we'd call a cap rate of 7 to
14 arrive at this 9.4 million.

15 Now I then took various ownership percentages
16 attributed to Mr. Swift. I have shown the amount, if he
17 were to have a 40 percent ownership, then I would multiply
18 that 9.4-million-dollar figure by 40 percent and arrive at
19 the 3,778,870. And I have shown it for 37 and a half
20 percent and 35 percent. And I'm just simply taking that
21 9.4 million and multiplying it by those representative
22 percentages to give a range of value between 35 percent
23 and 40 percent for Mr. Swift's ownership.

24 Q. Now, Mr. Greene, is it not true that there are
25 many, many different methods of valuation for valuing

1 businesses?

2 A. Yes, there is.

3 Q. However, did you have occasion to review the
4 Handbook of Small Business Valuation Formulas specifically
5 as to a methodology for use as to drug stores?

6 A. Yes, I have.

7 Q. You cannot see the camera --

8 MR. STINE: Your Honor, I'm going to object unless
9 -- I mean, is that disclosed on his report?

10 MR. McGURK: It was one of the documents he refers
11 to the methodology that he, he thought was, was reasonable
12 by --

13 MR. STINE: Can you -- I'm not saying he didn't,
14 can you show me in the report wherever it was disclosed,
15 where he reviewed that publication.

16 MR. McGURK: Yes.

17 MR. STINE: I'm entitled to see what he looked at.

18 Q. (BY MR. McGURK) All right. First of all, let's go
19 back in terms of the, the methodology. The methodology
20 used by the Schaltenbrand and Schaltenbrand firm that you
21 have described here, is that accepted? Is that a standard
22 methodology?

23 A. It appears to be, yes.

24 Q. Now --

25 A. Yes.

1 Q. -- is this calculation a formal valuation of the
2 company under the professional standards?

3 A. No, it is not.

4 Q. And are you simply using the calculations, the
5 methodology used by the Schaltenbrand and Schaltenbrand
6 firm in plugging in the numbers from the financial
7 statements?

8 A. Yes, I am.

9 THE COURT: I'm going to jump in here and ask --

10 MR. McGURK: Yes.

11 THE COURT: -- why a cap of 7 on the times?

12 THE WITNESS: Essentially that was the method that
13 was used by Schaltenbrand and Schaltenbrand, and I simply
14 changed the amount of net profits based on the financial
15 statements. But that is the cap rate that they used.

16 THE COURT: What is the cap rate?

17 THE WITNESS: The cap rate is a multiple of
18 earnings to determine what the value is. When you think
19 of an investment, when you invest money into a bond, you
20 receive a portion called interest, and that interest is
21 the earnings on that investment. It's kind of the same
22 thing with a cap rate. If you, for example, Your Honor,
23 if you invested \$100,000 and you were receiving 5 percent
24 interest, then each year you would receive \$5,000. Since
25 the cap, since it's 5 percent, then that's a cap rate of

1 20. Twenty times the 5,000 would take you back to the
2 amount of the investment, which would be \$100,000.

3 When businesses are valued, they typically use a
4 cap rate and multiply that times some form of earnings or,
5 you know, there's various methods but it could be net
6 income, it could be cash flows, to determine value. And
7 the cap rate is a measure that can be applied based upon
8 the risks and profitability of the business. In this
9 particular case, the cap rate was chosen by Schaltenbrand
10 and Schaltenbrand to be the number 7. So if you think
11 that would be the equivalent of, what, roughly a 13
12 percent return, multiplying 13 by 3 is 91, a little bit
13 more than that, I'm sorry, about 13 and a half percent
14 return.

15 But that cap rate was selected by them. I did
16 review the publication that Mr. McGurk is referring to.

17 MR. STINE: Your Honor, I'm --

18 THE COURT: Okay, you have answered my question.
19 Go ahead.

20 Q. (BY MR. MCGURK) Now referring to page 7 of 11 of
21 your report, you refer, you use the years 2005 through
22 2007.

23 A. Correct, to determine the amount of unpaid
24 commissions and profits.

25 Q. And referring to page 10 of 11, you also use the

1 years 2005 through 2007?

2 A. Correct.

3 Q. Why do you use those three years?

4 A. I used those three years because the only set of
5 financial statements that appear to properly account for
6 this entity were the ones that have recently been
7 disclosed by Schaltenbrand and Schaltenbrand and --
8 showing that the DeliverMed Medicate's profits, and I
9 haven't been able to obtain any financial statements of a
10 like kind since that date. So, to me that's the most
11 reliable set of financial statements I can use to, to
12 determine that computation.

13 Q. Now, if you were to be advised that there was
14 another bank account reflecting activity at another bank
15 by the entity and those receipts were not included in the
16 financial statements for the years 2005 through 2007, that
17 obviously would mean your calculation would be low; is
18 that correct?

19 A. It may be. I mean, I don't know what -- you know,
20 again, you'd have to try to determine what impact this,
21 this additional information may have on the profits of the
22 business.

23 Q. Now let's turn to the issue of, of commingling.
24 What do you understand that term to mean in terms of, of
25 businesses?

1 MR. STINE: Your Honor, I'm going to object. I
2 don't see any place in his report that he uses the word
3 commingling. He has given no opinions on commingling and
4 now we're asking him to talk about it. I don't know
5 where --

6 THE COURT: Mr. McGurk, are you -- are you
7 switching subjects now or --

8 MR. MCGURK: Well, I, I'm trying to demonstrate,
9 Your Honor, that this report is, accepts the financial
10 statements provided by Schaltenbrand and Schaltenbrand.
11 And to the extent that those financial statements include
12 the costs of other entities, that certainly should be a
13 factor that the Court should consider in terms of
14 determining the issue of valuation.

15 THE COURT: So you are talking about commingling
16 other businesses into this --

17 MR. MCGURK: That's right. In other words, if, if
18 other -- if the expenses, for example, the expenses of DME
19 are being paid through Medicate Pharmacy Central, that
20 factor certainly is --

21 THE COURT: I understand.

22 MR. MCGURK: Do you understand?

23 THE COURT: I will admit it for, and will consider
24 it for whatever the, whatever the Court to consider -- I
25 will -- you can go ahead and inquire about that. The

1 Court may or may not consider whatever the testimony is.

2 MR. McGURK: Thank you.

3 Q. (BY MR. McGURK) Mr. Greene, what do you understand
4 the concept of commingling to be in the concept of
5 businesses owned by a single owner?

6 A. Yes, I do.

7 Q. And what is that?

8 A. Commingling typically means that there are
9 transactions that are related to either another entity or
10 transactions related to an individual that are paid by a
11 business entity for which no benefit is achieved. In
12 other words, these are expenses that should have gone to a
13 different business entity or perhaps they're expenses of
14 an individual and as a result they should not have been
15 paid by this entity, and the entity received no benefit
16 from the expenditure of those funds.

17 Q. Did you attempt in making your determination of
18 the unpaid share of profits due to Mark Swift, did you
19 attempt to break out any expenditures for other entities?

20 A. No, I did not.

21 Q. Now, turning to the concept of personal expenses
22 being paid by a corporate entity, if personal expenses are
23 paid by a corporate entity for the owner, are those
24 appropriate for determination of the profits of the
25 company?

1 MR. STINE: Your Honor, I'm going to object again.
2 This witness has given no opinion that I can see on the
3 profits of this company. He's given no opinion regarding
4 personal expenses versus corporate expenses.

5 THE COURT: The Court's aware of that.

6 MR. STINE: Okay.

7 THE COURT: Okay. The Court's aware of that.

8 MR. MCGURK: Rather than ask the question be read
9 back, Your Honor, may I restate it?

10 THE COURT: Sure.

11 Q. (BY MR. MCGURK) First of all, Mr. Greene, is it
12 appropriate for personal expenses to be paid by a company
13 for the owner of the entity, and deducted from the
14 business profits?

15 A. Typically, no. No. From an IRS standpoint, they
16 usually look at a test called ordinary and necessary
17 expenses of a business. If those items that are paid are
18 not in fact related to that business then it would be
19 inappropriate to put them on the financial statements nor
20 deduct them on the tax returns.

21 Q. And as with the issue of commingling, did you
22 attempt to do an analysis of the financial records of
23 Medicate Pharmacy to determine personal expenses paid that
24 were not appropriate?

25 A. No, I did not.

1 Q. A couple of basic questions. In terms of
2 reviewing the books here, the financial books, can you
3 simply give us a, a brief explanation of, of the
4 relationship between the, the general ledger books of
5 account and then the tax returns, explain how those work
6 together?

7 A. Certainly. In accounting we have something, what
8 we call source documents, so when a business goes out and
9 pays its bills they write checks that are considered
10 source documents, when they incur expenses they get
11 invoices from a vendor which are considered source
12 documents. When they sell their goods, they may invoice
13 their customers. That's a source document. When the
14 money comes into their business to pay for those goods,
15 that deposit is a source document.

16 In the world of accounting, what we do is that all
17 these various source documents are collected into what's
18 commonly referred to as journals. Most small business
19 accounting systems have journals consisting of a sales
20 journal that accounts for all the sales of their goods or
21 services to their customers. They have a cash receipts
22 journal that accounts for all the money that's paid in by
23 their customers for these sales of goods and services.
24 They have a cash disbursement journal which accounts for
25 all of the checks that are written out of the business for

1 its business expenses and other things. They have
2 typically a purchases journal which records all of the
3 invoices for all of the items that are purchased by the
4 company. And then they typically have a payroll journal
5 which records all payroll to their employees. And I may
6 have missed some, but also a general journal where
7 accountants may make entries of a noncash nature or for
8 actions due to books and records. These various journals
9 are summed up, especially in the old days when we used to
10 do it by hand, they would sum these journals up and the
11 totals of those journals would be posted or recorded into
12 a general ledger.

13 So the general ledger was a summary. Accounting
14 is really a summary process. Source documents are
15 accumulated, summarized into a journal. Journals are
16 totalled, summarized, and put into what is called a
17 general ledger. A general ledger is a listing of the
18 accounts of the business and entries are made from the
19 various journals to those accounts.

20 Accounts would include such things as the amount
21 of cash in the bank, amounts due from customers, amounts
22 due to vendors, the sales that are made by the company,
23 the expenses incurred such as occupancy, rent, telephone,
24 utilities, labor costs, advertising, marketing, all these
25 various accounts are listed in this general ledger.

1 What happens is, each month totals are posted from
2 the various journals often into the general ledger, but
3 today with our computer accounting system sometimes it's
4 posted in much more detail. But in any event, the general
5 ledger then is totalled, typically once a month. Those
6 totals show how much is expended by the various accounts.
7 And those figures then, in the old days, they would go to
8 another document, summarized into another document called
9 a trial balance.

10 From the trial balance, that was literally what
11 accountants would call it, to make sure that the books
12 were in balance. Of course today with computers there's
13 much more accuracy.

14 From the trial balance, financial statements would
15 be prepared. And those financial statements were used by
16 the owners, lenders, customers, you know, people like
17 that. And in preparing a tax return, typically a tax
18 return, you would use a combination of the financial
19 statements and the underlying accounting documents that I
20 described in order to prepare the tax return.

21 Q. Mr. Greene, what is treasury stock?

22 A. Treasury stock is stock that has been previously
23 issued by the company. What I mean by that is that the
24 shareholder, the owners of the company in a corporation
25 are issued what's called shares of stock. They typically

1 pay in some amount for those shares of stock and often we
2 use something called par value. And often par value is --
3 for example, a dollar a share. Investors may in fact pay
4 much more than a dollar and when they purchase the stock,
5 it is accounted for as common stock and the additional
6 amounts of money beyond that is called additional paid in
7 capital. So the stock is now issued to the shareholders
8 and they hold it.

9 For various reasons, from time to time companies
10 may decide to purchase the stock directly back from the
11 shareholders. The reason that they do that is especially
12 in larger companies by purchasing back the stock, it
13 reduces the number of shares outstanding. And when you
14 reduce the number of shares outstanding, then the
15 computation that we use called earnings per share goes up.
16 The reason why that's important is, in the markets today,
17 the capital markets, the larger or higher the earnings per
18 share is of the company, the more valuable the stock is.
19 So often there's an incentive for companies to buy their
20 stock back so that they could reduce the number of shares
21 outstanding.

22 When they buy the shares back, it's typically
23 referred to as treasury stock. In other words, it's a
24 stock that's now been acquired by the shareholders that is
25 being held by the company within their treasury. And they

1 have that stock now available to resell to other
2 shareholders should they so desire.

3 Q. Returning -- turning -- I'm going to ask you to
4 turn to page 5 of 11 of your report.

5 A. Okay.

6 Q. I'm just going to use a handwritten sheet here to
7 just do some totals. And the first entry is 860,000 --
8 I'm sorry, \$860,647 for the 2005-2007 past profit; is that
9 correct?

10 A. That's correct, the unpaid share of profits for
11 those years.

12 Q. And the past wages, you had calculated through
13 February 21st of this year as being \$176,333.

14 A. That is correct.

15 Q. And the unpaid profit distributions based upon the
16 distributions to Mr. Schaltenbrand were 642,269; is that
17 correct?

18 A. Yes, it is.

19 Q. And then the box fill item that you have testified
20 to is \$30,132.

21 A. Yes, sir.

22 Q. The total we have come to here is \$1,709,381. All
23 right?

24 A. I haven't done the math, but I trust.

25 Q. Then using the midpoint of the valuation between

1 the 3.2 million and the 3.7 million, using 3.5, the total
2 value -- the total amount of all of these figures is
3 \$5,209,381. Do you see that?

4 MR. STINE: He can't see it.

5 A. To be honest with you, I can't see it. I have not
6 done the math, sir, I'm sorry. If you'd like me to, I
7 can, but --

8 MR. STINE: Judge, we'll stipulate that that's
9 what that adds up to.

10 THE COURT: All right. I need to jump in here
11 right now. It's scary when your law clerk is thinking the
12 same thing you are thinking. And she handed me a note,
13 and I've been dying to ask this question but I think I
14 know the answer to it.

15 MR. STINE: I hope you're not going to ruin my
16 brilliant cross-examination by preempting me.

17 THE COURT: I might. One and three, you know,
18 the, getting the 860,647 of unpaid share of profits and
19 the 642,269 unpaid profit distributions, are you talking
20 about the same thing just in different years? I mean,
21 I've heard testimony about the, the 50 percent, 40 percent
22 and 10 percent, and then there was an adjustment. And you
23 have unpaid share of profits for '05, '06 and '07 and then
24 you do the unpaid distributions of '08, '09 and '10. But
25 are you really talking about the same thing, the same

1 percentage distribution?

2 THE WITNESS: No, I'm not, Your Honor. If I can
3 explain, I think I can clear this up. The 860,647 --

4 THE COURT: I know they come from different -- one
5 comes from financial statements and the other one comes
6 from I guess tax returns, I guess. Go ahead.

7 THE WITNESS: Correct. But the 2005, '06 and '07,
8 this amount represents, what my understanding the
9 agreement was, before Mr. Swift was to become an owner and
10 a shareholder within the company.

11 And it's my understanding the agreement was, is
12 that Mr. Swift and Miss Sickon was to receive 40 percent
13 of the profits. So, for the years 2005, '06 and '07,
14 those computations are the agreement that says, I will
15 give you 40 percent of the profits. Now --

16 THE COURT: Okay, what's the difference -- what's
17 the difference between that and the 642,000?

18 THE WITNESS: Beginning in 2008, it then changes.
19 And instead of me giving you 40 percent of the profits, I
20 now make you an owner of the company. And since the
21 company filed as an S corporation, what it did was it made
22 distributions to its shareholders. In this case, the only
23 distributions that were made were to Mr. Schaltenbrand.

24 But what we're saying is, is that if Mr. Swift is
25 a shareholder of that company, then he should -- he, too,

1 should have received distributions for the years 2008,
2 '09, '10 and into '11.

3 THE COURT: And the same -- hold on a second.
4 Would that be in the same percentage as before?

5 THE WITNESS: Percentages --

6 THE COURT: Pardon?

7 THE WITNESS: No, sir. The -- originally my
8 understanding was for the year 2008, the ownership was
9 37.5 percent by Mr. Swift, and then subsequent the
10 ownership changed to 35 percent by Mr. Swift.

11 THE COURT: But you are still talking percentages?

12 THE WITNESS: Yes, sir. But these percent -- but
13 these distributions are not the same thing as net income.
14 Distributions are the amounts or the sums that Mr.
15 Schaltenbrand has taken out of the company.

16 Now, presumably they are distributions of income
17 but they are not the same thing as net income.

18 THE COURT: Okay. Go ahead.

19 THE WITNESS: Does it help or still clear as mud?

20 THE COURT: Clear as mud, but go ahead. I think I
21 understand where you are coming from.

22 THE WITNESS: In other words, the -- you know, you
23 have both the change in percentages but you also have a
24 change in the character of the agreement.

25 THE COURT: Right.

1 THE WITNESS: The original agreement was, I'll
2 share profits. The new agreement is, you are now my
3 business partner and if you're my business partner then
4 you should receive distributions just as I do.

5 THE COURT: Okay. Go ahead.

6 MR. McGURK: Those are all the questions I have,
7 other than we would offer Plaintiff Exhibits 1, 2 and 3.

8 THE COURT: 1, 2 and 3, they will be admitted.

9 MR. McGURK: Thank you.

10 MR. STINE: Judge, can we take just a one-minute
11 break?

12 THE COURT: We'll take a 5-minute break.

13 (Court recessed from 3:39 p.m. to 3:47 p.m.)

14 THE COURT: All right. Okay. We are back on the
15 record. Cross-examination, Mr. Stine.

16 CROSS-EXAMINATION

17 BY MR. STINE:

18 Q. Mr. Greene, my name is Kevin Stine. I'm one of
19 the attorneys representing the defendants in this case.
20 You've talked in your exhibit, Plaintiff's Exhibit 3, in
21 your later report about this new information that was just
22 discovered. Are you just saying it was new to you?

23 A. Well, it was my understanding that it was new to
24 the attorneys. It was certainly new to me when I prepared
25 this report, yes.

1 Q. Okay. You weren't implying somehow that it was
2 hidden from you, were you?

3 A. It was given to me by counsel earlier this year.

4 Q. Okay. If you would, turn to page eight of your
5 report, which I think is 6 of 11, but I'm going to refer
6 to the page numbers on the bottom.

7 A. Yes, sir, 6 of 11, you say?

8 Q. Yes. And it's the first sentence of the paragraph
9 at the top that says "payments of profits were made to
10 Sickon under this agreement until mid 2007 and were to be
11 reported on the federal government form 1099."

12 Do you see that?

13 A. Yes, sir, I do.

14 Q. Okay. What -- did you see any 1099s given to Ann
15 Sickon in reviewing any of the materials in this case?

16 A. Not that I recall.

17 Q. Would you have expected to see one?

18 A. Well, I believe there was one issued in 2007 that
19 was issued to Mr. Swift. If in fact payments were made to
20 Miss Sickon then, yes, I would have.

21 Q. Okay. And then later on in that paragraph, I
22 think it's the last sentence, it says, this agreement
23 continued through the end of 2007 at which point the
24 parties agreed to a change in the compensation structure
25 and a federal form 1099 was issued to Mark Swift for 2007.

1 Is that the 1099 you were just speaking about?

2 A. I believe so, yes.

3 Q. Okay. Now, at some point I think you testified
4 that the agreement changed in mid-2007 -- or strike that.
5 You didn't testify.

6 In your report you stated that the agreement
7 changed some time in mid-2007 so that the share of the
8 profits originally payable to Sickon would be payable to
9 Mark Swift as he took over the mail order business; is
10 that correct?

11 A. Yes, that is my understanding.

12 Q. What mail order business are you referring to
13 there?

14 A. I believe the sale of the pharmaceutical drugs
15 through the mail.

16 Q. Okay. So all mail order business of Medicate
17 Pharmacy Inc.?

18 A. As related to DeliverMed, as I recall.

19 Q. Okay. So you understood that there was a separate
20 component under Medicate Pharmacy Inc. that was referred
21 to as DeliverMed?

22 A. Yes, sir.

23 Q. Okay.

24 A. As I saw in the financial statements.

25 Q. And that's what you were referring to there?

1 A. Yes, sir.

2 Q. Okay. Was it your understanding that prior to
3 mid-2007 that Ann Sickon was handling the administration
4 of the mail order?

5 A. I don't know if I had any knowledge of that.

6 Q. Okay.

7 A. I know it was originally -- it was my
8 understanding she was to receive payments.

9 Q. I'm just asking because you say in mid-2007 Mark
10 Swift took over the administration of the mail order and
11 he would start receiving the money. Were you, was it your
12 understanding that -- who did he take it over from?

13 A. Oh, I'm sorry, from Miss Sickon, his wife.

14 Q. Okay. So your understanding was prior to mid-2007
15 Ann Sickon was doing the mail order administration for the
16 DeliverMed project?

17 A. That's what it would appear, yes.

18 Q. Okay. You also state that under the new agreement
19 Swift was to acquire a 35.32 percent ownership in Medicate
20 Pharmacy Inc. Who told you that?

21 A. That I reviewed in the e-mail dated January 16th
22 that Mr. Schaltenbrand had sent to Mr. Swift.

23 Q. And is that e-mail a part of your report?

24 A. I reference it down at the bottom of page 6.

25 Q. Okay. But you don't have it as an attachment, you

1 are just referencing that date of an e-mail?

2 A. It was shown as an exhibit in our May 17, 2010,
3 report, I believe.

4 Q. Okay. Let's talk now about this first component,
5 this unshared share of profits that's on page 9 of your
6 report.

7 THE COURT: Page 7 of 11?

8 MR. STINE: 7 of 11. I'm sorry.

9 THE WITNESS: Yes, sir.

10 Q. (BY MR. STINE) And I'm going to go to your table.
11 And my understanding on your direct examination is that
12 the numbers for 2005 and 2006 were taken from financial
13 statements under the name of mail order, had mail order in
14 the name of it; is that correct?

15 A. I believe that it said Medicate DeliverMed. I
16 don't recall -- I'm not certain as I sit here whether or
17 not it said mail order.

18 Q. Okay.

19 A. As I recall, it said DeliverMed.

20 Q. And what you did is you basically pulled the
21 numbers for 2005 and 2006 of the net income as shown on
22 those financial statements, multiplied times 40 percent to
23 come up with the second column; is that correct?

24 A. Yes, sir.

25 Q. And then where did you get the number in the third

1 column?

2 A. I reference here that they show in the financial
3 statements payments to Sickon and Swift, so I have
4 referenced back to those same set of financial statements.

5 Q. So if we --

6 A. Right under there, the PP-926 would be from that
7 same set of financial statements.

8 Q. Okay. You would agree that these calculations are
9 only as accurate as the financial statements that you
10 relied upon; is that correct?

11 A. Yes.

12 Q. So if the financial statements overstated profit,
13 you are overstating the net amount due Sickon and Swift;
14 right?

15 A. That's possible, yes.

16 Q. Well, is it -- is it anything else but true?

17 A. If the numbers were to be greater -- or, I'm
18 sorry, if the numbers shown here are greater -- is that
19 what you are saying? Than what they should be?

20 Q. What I'm saying is, in 2005 if the financial
21 statements are wrong and there was not \$404,087 of net
22 profit but instead there were only \$200,000 in net profit,
23 the number on the far right will go down; correct?

24 A. That is correct, sir.

25 Q. Okay. The profit number you used for 2007, where

1 did you get that number?

2 A. That also came out, came off a financial statement
3 that was prepared by Schaltenbrand and Schaltenbrand.

4 It's PP-932.

5 Q. Do you recall what the name was on that financial
6 statement?

7 A. I'm thinking it said the same thing, which is
8 Medicate DeliverMed, which I'm not certain as I sit here
9 but that's the document I looked at.

10 Q. I thought you testified on direct, and maybe I'm
11 wrong, that because the financial statements that were for
12 the Medicate DeliverMed that you refer to in 2005 and 2006
13 were not complete for 2007, so you got 2007 from a
14 different place. That's not true?

15 A. I believe you are confused, sir. I believe you
16 are talking about the next section where we talk about the
17 distributions.

18 Q. Okay. So if I look at the financial statements --

19 A. These three years all came from financial
20 statements prepared by Schaltenbrand and Schaltenbrand.

21 Q. What I'm asking you is, the financial statements
22 for 2005 and 2006, I think you state -- let me ask you
23 this: Do you have your source documents with you?

24 A. No, I do not, sir.

25 Q. Because so far into evidence I don't think we have

1 any documents that have PP-927 or PP-931, and maybe I'm
2 mistaken.

3 MR. STINE: I -- do we have them?

4 MR. McGURK: The PP that's referred to is a Bates
5 number at the bottom of the page, and we did that to
6 identify documents that had been previously produced. And
7 that's why that's -- that's why that number appears. And
8 we did not redact Bates numbers, we did redact --

9 THE COURT: The PP?

10 MR. McGURK: No, we redacted identifiers such as
11 Social Security numbers or account numbers, those types of
12 redactions.

13 MR. STINE: Okay.

14 Q. (BY MR. STINE) So you believe that the Medicate
15 net income for -- S and S prepared financial statements
16 for 2007 came off of the same set of financial statements
17 as 2006 and 2005 just for a different year?

18 A. Well, you are saying the same set of financial
19 statements. Obviously these are all three different
20 years, but there were three different sets of financial
21 statements prepared by Schaltenbrand and Schaltenbrand,
22 and that is the source of where these figures come from.
23 And again, you know, I assume these were the Bates numbers
24 that was in evidence, that these are the numbers that were
25 shown on the documents that were given to me.

1 Q. Okay. For 2007, would it surprise you if the net
2 income through September of 2007 was only \$559,000?

3 A. I have no opinion. I haven't seen it.

4 Q. Okay. You didn't see anything that showed that?

5 A. Not that I recall.

6 Q. Okay. Are you aware that Medicate Pharmacy Inc.
7 is on an accrual based accounting?

8 A. Yes.

9 Q. And what does that mean?

10 A. Accrual based accounting means that you record
11 transactions, for example, on the revenue side which is
12 the sales, you record the transactions when revenues are
13 earned. That is, if the product is shipped it may not be
14 paid for but it is earned, so therefore you record it on
15 an accrual basis as income at that point in which shipment
16 occurs.

17 Likewise on the bills side, you record expenses
18 when they are incurred. And by incurred I mean I have
19 used that product, that service and so forth, even though
20 I may not have paid for it.

21 So from an accounting perspective, accrual is the,
22 in accounting what we do is match the revenues with the
23 appropriate expenses in the time period in which the
24 transaction occurred, not necessarily when it was paid,
25 which is a cash basis.

1 Q. So if you have a one million dollar sale in 2007
2 and I send a bill for that, that gets listed for revenue
3 in 2007; is that correct?

4 A. Presuming that you meet all the revenue
5 recognition criteria of generally accepted accounting
6 principles, yes.

7 Q. Regardless of whether it gets paid in 2007 or not,
8 that's considered revenue on the books; correct?

9 A. Well, may I have -- I'm sorry, may I have your
10 example back one more time?

11 Q. If I have a -- if I bill somebody a million
12 dollars for a product sold in 2007, I send the bill in
13 2007 but I don't get paid in 2007, I get paid zero, I
14 still have a million dollars of revenue shown on my tax
15 return for 2007; correct?

16 A. Using accrual method, as long as those products
17 are delivered and they meet the criteria for what we call
18 revenue recognition which means you have to show the sale
19 actually occurred in 2007, the answer is yes.

20 Q. And if you are on accrual basis accounting, isn't
21 it true that in order to calculate revenue, accounts
22 receivable play an integral part in making that
23 calculation?

24 A. Well, as part of recording revenue on a set of
25 books and records on the accrual basis, yes. Accounts

1 receivable are the other asset, if you will, when an item
2 is sold but not paid for.

3 Q. So, for example, in 2007 I make a mistake, my
4 accounts receivable are actually \$200,000 on the books, I
5 make a mistake and I list them as \$2.2 million on the
6 books, that will show a corresponding false increase in
7 revenue for 2007; correct?

8 A. It may. I mean, I --

9 Q. Okay.

10 A. You're making mistakes. You could make mistakes
11 in other parts of the books. But presumably if you are
12 telling me that you made a mistake on both sides, then the
13 answer is yes.

14 Q. Okay. Okay, let's move on to unpaid salaries.
15 Have you ever terminated an employee?

16 A. Yes, I have.

17 Q. And did you continue to pay that employee's salary
18 after you terminated them?

19 A. If we had a severance agreement, you know, in
20 effect, yes.

21 Q. What if you didn't have a severance agreement?

22 A. No.

23 Q. Okay. You were aware that Mr. Swift was
24 terminated as an employee of Medicate Pharmacy Inc. in
25 September of 2009; correct?

1 A. I was aware that I know payments were stopped
2 being made, that I do know.

3 Q. Well, you were aware he was terminated, weren't
4 you?

5 A. I wasn't there so I don't know if he was actually
6 terminated or if they just had a falling out or what the
7 circumstances were. I know payments stopped.

8 Q. Well, turn to page 7 of 11 of your report and read
9 the top sentence for me.

10 A. Oh, okay. Schaltenbrand in 2009 terminated
11 Swift's employment with the company. All right.

12 Q. So you knew he was terminated; right?

13 A. That's what I have written, yes.

14 Q. But you, despite that, continue to state that he
15 is accruing salary at a thousand dollars a week after that
16 date; is that correct?

17 A. Correct.

18 Q. Okay. So do you think that's wrong?

19 A. What's wrong, sir?

20 Q. That you continue to accrue salary after he's
21 terminated?

22 A. Well, I'm not their accountant, I'm simply showing
23 damages. That if Mr. Swift was in fact wrongfully
24 terminated, this is what he's owed.

25 Q. Well, do you know if there's a wrongful

1 termination claim in this lawsuit?

2 A. I don't know that, no.

3 Q. Okay. Now, you assert that your understanding is
4 Mr. Swift was promised \$151,000 and part of that was
5 repaid and part of that was not repaid; is that correct?

6 A. That is correct, sir.

7 Q. And that was a promise to pay \$151,000; correct?

8 A. That is my understanding, yes.

9 Q. Now, you testified earlier it was your
10 understanding that Mark Swift did not become involved in
11 the mail order operations until mid-2007; is that correct?

12 A. As I have written in the report, yes.

13 Q. Why would Mr. Swift be entitled to any salary when
14 he wasn't working at Medicate Pharmacy?

15 A. It's my understanding this was the agreement back
16 then between himself and Mr. Schaltenbrand, and that
17 payments were made which we see in the payroll against
18 this 151,000, we saw these payments of 12,583.

19 Q. Well, was it your understanding that he should
20 have received a W-2 for those payments?

21 A. If he received money, yes, he should have for
22 salary.

23 Q. Even the back payments?

24 A. If it was received -- yes, if it was paid as
25 salary, yes.

1 Q. Okay. So if he didn't receive a W-2 it probably
2 wasn't paid as salary, would you agree with that?

3 A. I don't know that. I don't know how it was
4 treated on the books and records. I don't know if errors
5 were made by Schaltenbrand or not.

6 Q. Well, let me ask you this: If I was not your
7 employee in 2006, can you make an agreement with me after
8 that date to pay me back wages for 2006?

9 A. I think you're asking me to render a legal
10 opinion, which I'm not qualified to do.

11 Q. Okay. Isn't it true that if Mr. Swift had been
12 paid a salary in 2005 and 2006 and 2007, that salary would
13 be deducted as an expense from the net -- before
14 calculating net profit?

15 A. That is correct, sir.

16 Q. You didn't take that into consideration in
17 calculating net profit here, did you?

18 A. Portions of it appear to have been taken into
19 consideration, those portions that were paid.

20 Q. I didn't understand you. You broke up.

21 A. I'm sorry. Which figure are you referring to?

22 Q. I am referring to the figure you are claiming he
23 is owed back salary prior to 2007, that's your first line
24 under salary, \$50,333; is that correct?

25 A. Yes, sir.

1 Q. So if he's paid that \$50,333, that will reduce the
2 net income for 2005, 2006 and 2007 on page 7 of 11;
3 correct?

4 A. From an accounting perspective it would be what --
5 in the year in which it was paid.

6 Q. Even if they're on an accrual basis?

7 A. I don't know if they have reflected this on the
8 financial statements. The answer to your question is, on
9 an accrual basis, yes, it should reduce those profits in
10 those previous years. As I sit here, I don't know if
11 these amounts are reflective in those numbers or not.

12 Q. Okay. And if they're not, they should be?

13 A. If these salaries are going to be paid, yes.

14 Q. Okay. Let's move on to page 9 of 11. The first
15 column, 2008 distributions to Schaltenbrand, \$935,399.

16 THE COURT: I want to go back to, before -- while
17 I have this curiosity. Have you ever heard of non W-2
18 salary?

19 THE WITNESS: No. But I mean, I guess what I was
20 trying to simply state is that, you know, businesses can
21 pay salaries and not issue W-2 forms.

22 THE COURT: Businesses can pay salaries to an
23 individual and not issue a W-2?

24 THE WITNESS: Yeah, it may be illegal but I'm
25 simply --

1 THE COURT: Oh.

2 MR. STINE: I thought you didn't -- weren't going
3 to give a legal opinion.

4 THE COURT: I just was curious whether or if you
5 had ever heard of non W-2 salary.

6 THE WITNESS: No, I haven't, Your Honor.

7 THE COURT: Okay. Now we can get on to unpaid
8 distributions.

9 Q. (BY MR. STINE) The 2008 distributions to
10 Schaltenbrand, \$935,399, did that come off of the Medicate
11 Pharmacy Inc. federal tax return filed in 2008?

12 A. As I recall, yes, it has a date stamp.

13 Q. Do you know what line or what description it would
14 be on the tax return?

15 A. Sure. There's actually a couple places it's
16 shown. There's a Schedule K that shows distributions to
17 owners. It's also shown on page 4 of the tax return as
18 well as, the form 1120-S

19 Q. Okay. Would that be shown under -- strike that.

20 Well, let me ask. Would that be shown under a
21 schedule called M-2?

22 A. As I recall.

23 Q. Okay. And the same would be true for 2009, it
24 came off the Medicate Pharmacy Inc. tax return; is that
25 correct?

1 A. Yes, it -- well, as I recall, yes, that -- I
2 reference the Bates number here as to those forms.

3 Q. Okay. Well, you don't have a Bates number for
4 2010. Where did that come from?

5 A. It came off the tax return but as you'll note on
6 my exhibit 3, I think it is, I indicate that it was not,
7 there was no Bates numbers on them. That's Item No. 8.
8 So that was not stamped, the copy that I had at least.

9 Q. So your testimony is the 272,800 for 2010 also
10 came off of the Medicate Pharmacy Inc. tax return for
11 2010?

12 A. As I recall, yes.

13 Q. Okay. And then where did -- 2011 did not come off
14 of a tax return; is that right?

15 A. That is correct.

16 Q. And I think you said that came off of a financial
17 statement?

18 A. Correct. That's a financial statement that was
19 prepared by Schaltenbrand and Schaltenbrand.

20 Q. Okay. In your calculation you assumed that Mr.
21 Swift is entitled to receive 37.5 of the net profits of
22 Medicate Pharmacy Inc.; is that correct?

23 A. That is correct.

24 Q. So if that is not true your calculation's wrong;
25 is that correct?

1 A. If it's supposed to be a different number then,
2 yes, it would affect the calculation.

3 Q. Okay. Now in this section I want to make sure I
4 understand your opinion because I'm not sure I do. I
5 understand your opinion, I don't agree with it, but I
6 understand your opinion under unpaid share of profits.
7 You are talking, it's a pretty straightforward opinion,
8 you take the net profit times 40 percent, less the amount
9 paid, and that's what you get; right?

10 A. Correct, sir.

11 Q. Okay. But under this section, you aren't
12 calculating or dealing with net profit at all, are you?

13 A. No, I'm basing it on the distributions that Mr.
14 Schaltenbrand took.

15 Q. Okay. So let's assume that in 2008 Medicate
16 Pharmacy Inc. made one dollar in net profit. And let's
17 suppose that that is proven beyond a reasonable doubt.
18 Your opinion is that Mark Swift is still entitled to
19 \$202,669. Is that your opinion?

20 A. In distributions based upon the internal revenue
21 code, yes, sir.

22 Q. Is it -- so your testimony is anytime there's a
23 distribution to one owner, there has to be a distribution
24 to all owners pro rata to their ownership interest in the
25 company?

1 A. Based on the internal revenue code section that I
2 cite, yes.

3 Q. Well, does that always happen?

4 A. Every subchapter S corporation I have dealt with,
5 it has to.

6 Q. Okay. Do you know what a capital account is?

7 A. Yes, I do.

8 Q. And what's the purpose of a capital account?

9 A. Capital account is typically used in a sole
10 proprietorship business to account for the owner's
11 investments, less their draws, plus their profits, minus
12 their losses. But this is not -- this is a corporation,
13 not a sole proprietorship.

14 Q. So a capital account would, that would be
15 appropriate to use if we had a partnership; is that true?

16 A. That is true.

17 Q. Okay. And under a partnership situation, all
18 distributions don't have to be equal, do they?

19 A. Depends on what the partnership agreement provides
20 for.

21 Q. Okay. Well, let me ask you this: In your
22 experience do you see partnership that don't have
23 agreements where there are other than pro rata
24 distributions being made on a regular basis?

25 MR. McGURK: Your Honor, I guess I'm going to

1 object because I don't exactly understand the question.

2 THE COURT: Yeah, why don't you --

3 MR. STINE: Okay, I'll rephrase.

4 THE COURT: Okay.

5 Q. (BY MR. STINE) Isn't the purpose of a capital
6 account within a partnership to keep track of what
7 distributions have been made to different partners so that
8 in the end they can even it all out, if somebody took too
9 much or somebody took too little?

10 A. Well, it's more than just distributions. What it
11 is, is really that partner's equity holdings in the
12 business, so it's affected by more than just
13 distributions. It's affected by profits, contributions to
14 the company and the like. And that's the purpose of it.

15 Q. Okay. Do you know if Mark Swift was a shareholder
16 of Medicate Pharmacy Inc.?

17 A. It's my understanding he was supposed to be. As
18 shown on the tax return, he was not.

19 Q. And you may have answered this and, if so, I
20 apologize. Is my understanding of the chart on page 9 of
21 11 correct, that this has nothing to do with net profits?

22 A. That is correct.

23 Q. Okay. Let's move on to reimbursement for excess
24 box filling charges. Is your expert opinion rendered in
25 this section simply that you read an e-mail that Joe

1 Siddl e said Mark Swi ft i s owed \$30,000? And so Mark
2 Swi ft' s owed \$30,000?

3 A. I --

4 Q. I'm sorry.

5 A. I -- oh. I also thought I saw testimony where Mr.
6 Schal tenbrand had agreed to that amount. But the basis of
7 i t i s, i s the computation that was performed by Mr.
8 Si ddl e --

9 Q. And so i f that computation was wrong --

10 A. -- as shown i n the e-mai l .

11 Q. I f that computation i s wrong, your number' s wrong;
12 correct?

13 A. Yeah, I have not tested that number. I have
14 accepted i t from Mr. Si ddl e.

15 Q. And you don' t even know what the number means, do
16 you?

17 A. Reimbursement for excess box filling charges, i s
18 what I am told that i t i s?

19 Q. Who told you that?

20 A. That i s my understanding by looking at the e-mai l .

21 Q. Okay. So your opinion i n that sense does really
22 nothing to assist the Court, does i t?

23 MR. McGURK: Your Honor, I'm going to object on
24 the basis of argumentative.

25 THE COURT: Overrul ed. Cross-exami nati on.

1 A. What it helps is determining the total amount of
2 damages that are owed to Mr. Swift.

3 Q. (BY MR. STINE) Okay.

4 A. That is another claim that Mr. Swift has against
5 Mr. Schaltenbrand.

6 Q. Okay. Let's turn to page 10 of 11, which is page
7 12 of your report, which is the business valuation. Your
8 report is not a business valuation, is it?

9 A. No, it is not.

10 Q. Okay. What is the effective date of this
11 valuation?

12 A. The figures used through the year 2007, it gives
13 some idea of what the potential value would be as of
14 today. But the figures stop at 2007 because I don't have
15 information after that.

16 Q. So you would agree that to the extent this is a
17 valuation, it's a valuation as of 2007; correct?

18 A. The figures that I have used are through 2007.
19 And again, it's not -- I did not perform a valuation. I'm
20 simply doing a computation based upon figures that have
21 been presented to me in the new set of financial
22 statements using the methodology by the accountants. I
23 did not -- as I very clearly point out, I am not doing a
24 valuation.

25 Q. You wouldn't want this methodology to be on your

1 record for future cases, would you?

2 A. I don't know that. I'm not a business valuator
3 nor do I, you know, and I made that very clear.

4 MR. STINE: Your Honor, based upon that I would
5 move to strike this portion of the report. If he's not a
6 business valuator and he's not giving that opinion, I
7 don't want to waste anybody's time going through it.

8 THE COURT: I'm not going to strike it. It will
9 go to the weight not to admissibility.

10 Q. (BY MR. STINE) So if this is done for valuation
11 as of 2007, what is the purpose of coming up with this
12 valuation?

13 A. It's to show the amounts based on the profits we
14 knew at that time. Those profits were based on financial
15 statements I believe. This was the same methodology that
16 was submitted to Mr. Swift in the same period of time in a
17 previous valuation by the accountant Schaltenbrand and
18 Schaltenbrand.

19 Q. So what you are saying is, if all of these numbers
20 are right and if this methodology is right, and if Mr.
21 Swift is a 35 percent owner, I'm going to use the smallest
22 number since I'm the defendant, then Mr. Swift's interest
23 in this company at the end of 2007 was worth
24 \$3,299,500.11 --

25 MR. MCGURK: Your Honor, he's misstating this.

1 It's three million, Your Honor --

2 MR. STINE: I'm sorry. I told you I was
3 representing the defendant. That was not intention.

4 THE COURT: I was going to saying, I mean, I'd pay
5 that, let's if, I'd leave. Go to the next bar.

6 Q. (BY MR. STINE) Let me restate that. You are
7 stating that as of the end of 2007 if all these things are
8 correct, the value of Mr. Swift's 35 percent interest, if
9 he had one, was \$3.3 million; correct?

10 A. Based on the methodology, yes, sir.

11 Q. And that if he wanted to sell his interest at that
12 point, that's what he should be paid; correct?

13 A. I don't know that, sir.

14 Q. Well, let me ask you this: If he gets paid \$3.3
15 million for his value of the business as of December 31,
16 2007, he wouldn't be entitled to any future profits or any
17 future wages or any future distributions, would he?

18 A. It would depend on the agreement, sir.

19 Q. Well what if there's no agreement?

20 A. I, I don't know if I can answer your question.

21 Q. You can't answer that question?

22 A. Well, I think it's a hypothetical question. What
23 you are saying is, is we're going back now to 2007 where,
24 and he was paid 3.3? Then the answer is, no, of course
25 not. He sold the business back in 2007.

1 Q. I'm going down the path you took me. You took me
2 to 2007. That's where I'm at.

3 A. Well, actually Mr. Schalt -- Schaltenbrand and
4 Schaltenbrand took us down that path.

5 Q. Okay. And I think you testified on direct
6 examination that the reason these, the third column over
7 you have these X factor of, 3, 2, 1, is that the most
8 current data is the best data.

9 A. The data that's shown here is the best data that
10 we seem to have which is the years '05, '06, '07.

11 Q. But let's suppose those numbers were drastically
12 different in 2012, '11, and '10. You'd rather use that
13 data, wouldn't you, if you were trying to value a
14 company today?

15 A. Of course.

16 Q. Okay. And really something five years old isn't
17 very reliable, is it?

18 A. I'm not sure I understand the question.

19 Q. Well, these numbers are five years old. How
20 reliable is that to try and value the company today?

21 A. If you are saying information five years old, to
22 put a value on it today, no, it is not as reliable as
23 something more current.

24 Q. Okay. Do you believe the methodology of
25 Schaltenbrand and Schaltenbrand is a proper valuation

1 methodology to use in this case?

2 A. I simply know that it's one method of valuation.

3 I did not do a business valuation of it, so I have no
4 opinion. I do, however, know that this is one methodology
5 that can be used for a pharmacy.

6 Q. But you have no opinion whether it should be used
7 in this case, whether it's proper to use in this case, or
8 anything like that, do you?

9 A. That is correct.

10 Q. Do you believe that Schaltenbrand and
11 Schaltenbrand employed a methodology that experts in
12 valuation find essential?

13 A. Again, I, I'm not purporting to be a valuation
14 expert so I have no opinion. I simply stated that this is
15 a methodology that I have seen written in a text that has
16 been used.

17 Q. Okay. Saw it on the internet?

18 A. No. Treatises.

19 Q. Okay. Do you believe that the methodology of
20 Schaltenbrand and Schaltenbrand is scientifically valid?

21 A. I have no opinion.

22 Q. You would agree that if the numbers in the first
23 column, the net profit numbers are erroneous, that this
24 valuation is erroneous; correct?

25 A. I would agree that, if the numbers are erroneous,

1 the computation that's shown is erroneous.

2 Q. Have you ever performed a business valuation?

3 A. Yes, I have.

4 Q. Okay. Did you -- have you ever used this method
5 to perform a business valuation?

6 A. Yeah, value -- a professional practice is often
7 valued this way so I believe, yes, I have, many years ago.

8 Q. Same thing, same formula, it's a multiple of
9 revenues it's not quite the same formula but it's similar.

10 Q. You said that there is a, you used a 7 cap rate
11 because that's what Schaltenbrand used; is that correct?

12 A. That's correct. I used their methodology.

13 Q. Okay. Would you pull out Plaintiff's Exhibit 2
14 and turn to page 28.

15 A. I'm sorry, sir. I don't have them marked. Which
16 one is that?

17 Q. That is your stock valuation report dated July 10,
18 2010 -- I'm sorry, July 7, 2010.

19 MR. McGURK: I believe that's --

20 A. It's prepared by a person in my firm, but I will
21 pull it out. What page, sir?

22 Q. (BY MR. STINE) 28. Do you have page numbers on
23 the bottom of yours or not?

24 A. I'm sorry, I don't.

25 Q. Okay. Then it might -- it's MS 000319. Do you

1 see those numbers on the bottom right-hand corner or not?

2 A. Give me one second, sir.

3 Q. Okay. Or maybe it would help you, it's Exhibit 3.

4 A. That's helpful, sir. Thank you.

5 Q. Is that the stock valuation report by
6 Schaltenbrand and Schaltenbrand that you reviewed as part
7 of your report in this case?

8 A. I believe that there was another one.

9 Q. Well, what one, what cap rate does this report use
10 that is attached as Exhibit 3 to your report?

11 A. I used the cap rate of 5.

12 Q. Okay. And obviously the higher the cap rate the
13 more the value, the higher the value; right?

14 A. The higher the computation, yes.

15 Q. Now, did you tell me just a minute ago that you
16 did not prepare this report, Plaintiff's Exhibit 2?

17 A. That is correct. It was -- well, it was prepared
18 by one of my staff members under my review.

19 Q. Well, is that, was Plaintiff's Exhibit 3 prepared
20 the same way?

21 A. No. Exhibit 3 was prepared by myself.

22 Q. Okay. You told me you were a forensic accountant;
23 is that correct?

24 A. Yes, sir.

25 Q. Were you hired this case to review the books and

1 records of Medicate Pharmacy Inc. from a forensic
2 accounting point of view?

3 A. Partially, in coming up with these opinions. The
4 question is, did I do a thorough audit of them? The
5 answer is no.

6 Q. Okay. And I think you said that a subchapter S
7 corporation, the owners pay tax on their personal return
8 is that correct?

9 A. Yes. The taxable income is distributed on a
10 schedule K-1, it's typically reflected on the -- it's
11 reflected on the personal income tax return.

12 Q. Okay. And you don't know if Mark Swift got a K-1
13 in this case, do you?

14 A. The tax returns that I saw did not show that he
15 did.

16 Q. Okay. You also testified that owners of a
17 corporation are issued shares of stock. Do you know if
18 Mark Swift was ever issued any stock in this case?

19 A. I don't know that.

20 Q. Okay.

21 MR. STINE: I don't have anything further, Your
22 Honor.

23 THE COURT: Any redirect?

24 MR. MCGURK: Very brief, Your Honor. I think we
25 have solved one issue that counsel raised. You heard the

1 questions.

2 REDI RECT EXAMI NATION

3 BY MR. McGURK:

4 Q. Mr. Greene, Mr. Stine asked whether you got the
5 mul ti ple or the cap rate off the internet. Do you
6 remember that question?

7 A. Well, I think he might have asked about the
8 methodology being off the internet.

9 Q. Do you recall your testimony about using a
10 treatise for the cap rate for drug stores? Do you recall
11 that?

12 A. Yes, sir.

13 Q. And was the name of that book, "Handbook of Small
14 Business Valuation Formulas?"

15 MR. STINE: I'm going to object. I didn't ask
16 anything about the cap rate. I asked about the
17 methodology.

18 THE COURT: I'm going to allow it. Go ahead, Mr.
19 McGurk.

20 Q. (BY MR. McGURK) By Glenn Desmond, D-E-S-M-O-N-D
21 and John Marcello, M-A-R-C-E-L-L-O, Valuation Press Inc.?

22 A. Yes, I have seen that handbook.

23 Q. And for drug stores, does that use the total
24 business value by applying multiples ranging from 6 to 7
25 as being a multiple for the net profit formula?

1 A. Yes, it does.

2 MR. STINE: Can I see that?

3 Q. (BY MR. MCGURK) Did you see any 1099 forms for
4 2005 or 2006 for either Mark Swift or Ann Sickon?

5 A. Not that I recall.

6 Q. Referring to the issue, to the question Mr. Stine
7 raised about termination, is it your understanding that
8 partners can fire their partners?

9 MR. STINE: Your Honor, I'm going to object.

10 THE COURT: I'm going to sustain that objection.

11 Q. (BY MR. MCGURK) All right. For 2007, did you use
12 the -- in your report, did you use the Schaltenbrand and
13 Schaltenbrand work papers and the 1099 issued by the
14 Schaltenbrand firm to Mark Swift?

15 A. As I recall, yes.

16 Q. On the issue of the testimony I believe, if I, if
17 I recall the testimony, Mr. Stine asked if the
18 calculations on your report, if the, if the information on
19 the report is, is wrong, that is to say, if the net
20 profits were lower than shown in the Schaltenbrand and
21 Schaltenbrand books, then as a result the amount due Mr.
22 Swift would be wrong is that -- do you recall that
23 testimony?

24 A. Yeah, I think for the years 2005 through 2007,
25 yes.

1 Q. Well, similarly, if the calculations of
2 Schaltenbrand and Schaltenbrand are wrong, for example,
3 because of commingling, costs for other entities or using
4 personal expense -- or paying personal expenses and the
5 profits should have been higher, similarly the amount due
6 Mr. Swift would be higher; isn't that right?

7 A. For those years, yes.

8 MR. MCGURK: I have no further questions.

9 THE COURT: Any follow-up?

10 MR. STINE: No, Your Honor.

11 THE COURT: Okay. Thank you, Mr. Greene.

12 And I also want to thank the Northern District
13 court personnel that helped put this together.

14 You are excused and thank you very much, Mr.
15 Greene. Have a -- what's the weather like in Chicago?

16 THE WITNESS: It's rainy, cloudy, nasty.

17 THE COURT: Well, see, you should have been down
18 here. It's sunny and 80 degrees and you guys should have
19 been down here.

20 MR. MCGURK: Your Honor, I would like to add my
21 thanks to Mr. Joe Novak from the clerk's office.

22 THE COURT: Yes, Mr. Novak, thank you very much.

23 VIDEO TECHNICIAN: I'm sorry we had connection
24 problems but I guess it worked out.

25 THE COURT: That's fine. Thank you very much.

1 MR. STINE: Your Honor, at this time I would like
2 to renew my objection to the admissibility of 1 -- or
3 Plaintiff's Exhibit 1, Plaintiff's Exhibit 2, and
4 Plaintiff's Exhibit 3. I think the testimony of the
5 witness was clear that these reports are not admissible as
6 expert reports. They did not, he did not employ the
7 methodology that experts in valuation find essential, the
8 reasoning and methodology underlying the testimony is not
9 scientifically valid, and under the Frymire versus KPMG
10 case in the Seventh Circuit it's simply not admissible.

11 THE COURT: Well, the Court's going to admit them
12 and, but their admissibility will go to the weight that
13 the Court gives their opinions not to their admissibility.

14 MR. STINE: Thank you.

15 THE COURT: It's been a long day, ladies and
16 gentlemen. I just found out that the Cardinals won today,
17 so I will show up tomorrow. If they hadn't of won, I
18 wouldn't be here. I'd be depressed.

19 MR. STINE: I'd be rooting for the Cubs if I'd
20 have known that.

21 THE COURT: Okay, Mr. Cox, tell me what the
22 program is for Thursday.

23 MR. COX: Well first, I'd like to move to admit 7.
24 That was the document that Mr. Siddle brought.

25 THE COURT: That will be admitted.

1 MR. COX: Housekeeping. And we would ask that the
2 original of that fax be produced to us, including the fax
3 cover sheet. In other words, that's just page two and
4 three of the fax. And --

5 THE COURT: If he has it.

6 MR. COX: Well I'm asking that, that the
7 defendants get it from their accountants. They're the
8 ones that sent it, which will tell us who sent it, when it
9 was sent, if there's anything written on the fax cover
10 sheet about it, and flesh out what we have are limited,
11 limited information now.

12 If they can ask their accountants to get the
13 original fax and produce it to us. And if not, if they
14 don't have the fax, at least the Schedule C that was
15 prepared, the original of it. We'd prefer to have the
16 whole document in its original form to view and see what
17 it says.

18 THE COURT: Okay. See if you can't --

19 MR. STINE: I'm not sure I understand. I thought
20 he brought the original Schedule C with him?

21 MR. COX: He brought what he received as his fax.
22 I'm asking for the document that was faxed on the other
23 end.

24 MR. STINE: So you're talking about everything
25 from the accountant's end?

1 MR. COX: Yes, and the fax cover sheet to go with
2 it.

3 MR. SCOTT: We'd like Mr. Schaltenbrand Senior to
4 bring that with him tomorrow.

5 MR. STINE: I'll have him look.

6 MR. COX: And Mr. Schaltenbrand Senior to answer
7 your question will be on the stand tomorrow. I think we
8 have to finish up with Mr. Siddie.

9 THE COURT: Right.

10 MR. COX: And then we'll have Mr. Swift will
11 begin.

12 THE COURT: How many Witnesses are you going to
13 have?

14 MR. COX: That will be it.

15 THE COURT: Mr. Siddie will be the last one.

16 MR. COX: I would just ask that Mr. Schaltenbrand
17 Senior, he's coming to testify would bring that together
18 with any work papers they used to create those numbers,
19 where they got them. In other words, they're preparing a
20 Schedule C we'd like to see the documents he used to,
21 where he got those numbers and, and the fax cover sheet to
22 go with it. So we'll get the full picture of what
23 happened here.

24 THE COURT: Okay.

25 MR. STINE: We got an issue here, Judge.

1 THE COURT: Uh-huh.

2 MR. STINE: I don't represent Schal tenbrand and
3 Schal tenbrand or Larry Seni or or Larry Juni or. Mi ke
4 Schal tenbrand can't really talk to him about anything
5 that's going on in here. How do we do thi s?

6 MR. COX: You can talk to them, I would think.

7 MR. STINE: I guess I can ask him.

8 THE COURT: You can ask him. Yeah, ask him to
9 bring i t.

10 MR. STINE: I can do that.

11 MR. COX: Thanks. Yeah. That's what the plan i s
12 for tomorrow, Judge.

13 THE COURT: Okay.

14 MR. COX: And I would say Mark will take us into
15 Fri day as well .

16 THE COURT: Okay.

17 MR. STINE: Probably won't get to Mark.

18 MR. COX: We may not get to Mark, who knows. But
19 that's the order.

20 THE COURT: Okay.

21 THE CLERK: 8:30?

22 THE COURT: 8:30. And we'll go as long as we can.

23 (Court recessed at 4:39 p.m.)
24
25

REPORTER'S CERTIFICATE

I, Christine A. Simpson, Registered Merit Reporter and Certified Realtime Reporter in and for the United States District Court for the Southern District of Illinois, do hereby certify that I was present at and reported in machine shorthand the proceedings in the above-mentioned court; and that the foregoing transcript is a true, correct, and complete transcript of the electronic recording.

I further certify that I am not an attorney for, nor employed by, nor related to any of the parties or attorneys in this action, nor financially interested in the action.

I further certify that this transcript contains pages 477-740 and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

IN WITNESS WHEREOF, I have hereunto set my hand at Benton, Illinois, this 26th day of April, 2012.

s/Christine A. Simpson, RMR, CRR

Christine A. Simpson, RMR, CRR